EDITOR'S NOTE

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(3)

No. 99-5746

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

Supreme Court, U.S.
FILED
AUG 10 (99)
OFFICE OF THE CLERK

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Scheduled
September 1, 1999

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91 pp

As this Court held in response to a similar challenge in *United States v. Porter*, 909 F.2d 789, 794–95 (4th Cir.1990), "[t]his challenge does not state an appealable question under 18 U.S.C. § 3742." *Id.*

V.

Accordingly, the sentence imposed by the district court is

AFFIRMED.

Lonnie WEEKS, Jr., Petitioner-Appellant,

v.

Ronald J. ANGELONE, Director of the Virginia Department of Corrections, Respondent-Appellee.

No. 98-21.

United States Court of Appeals, Fourth Circuit.

Argued March 1, 1999.

Decided May 10, 1999.

After his conviction for capital murder of state trooper was affirmed on appeal, 248 Va. 460, 450 S.E.2d 379, petitioner sought habeas corpus relief. The United States District Court for the Eastern District of Virginia, Rebecca B. Smith, J., 4 F.Supp.2d 497, dismissed petition. On petitioner's application for certificate of appealability, the Court of Appeals, Williams, Circuit Judge, held that: (1) jury instructions at sentencing did not improperly preclude jury from considering relevant mitigating evidence; (2) claim that petitioner was entitled to appointment of pathology and ballistics experts would require application of new rule in violation of *Teague*; (3) admission of petitioner's confession that was made after petitioner initially cut off questioning was not contrary to or unreasonable application of Supreme Court precedent; (4) petitioner procedurally defaulted claims which state supreme court declined to address due to noncompliance with procedural rule; (5) petitioner procedurally defaulted claims which he failed to brief before state supreme court; and (6) petitioner procedurally defaulted his claim of ineffective assistance of counsel.

Application for certificate of appealability denied and petition dismissed.

1. Habeas Corpus ⇐452

For a claim that was adjudicated on the merits in state court proceedings, Court of Appeals will not issue a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act (AEDPA) unless (1) the state court decision is in square conflict with Supreme Court precedent that is controlling as to law and fact or (2) if no such controlling decision exists, the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant Supreme Court precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts. 28 U.S.C.A. § 2254(d).

2. Habeas Corpus ⇐842

When a habeas petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits, Court of Appeals reviewing denial of habeas relief reviews questions of law and mixed questions of law and fact de novo.

3. Habeas Corpus ⇐422

State Supreme Court's statement that capital murder defendant effectively presented no argument in support of his claim that trial court's actions prevented jury from considering relevant mitigating evidence at sentencing did not establish that dismissal of that claim was procedural, in view of other statements indicating that claim was addressed on the merits, so claim was reviewable in federal habeas proceeding.

4. Habeas Corpus ⇐450.1

Where the state supreme court has adjudicated a claim on the merits but has given no indication of how it reached its decision, a federal habeas court must still apply the standards of review set forth in Antiterrorism and Effective Death Penalty Act (AEDPA), and a state court's perfunctory decision is reasonable if it is at least minimally consistent with the facts and circumstances of the case. 28 U.S.C.A. § 2254(d).

5. Homicide ⇐358(1)

Jury instructions at sentencing in capital murder trial did not improperly preclude jury from considering relevant mitigating evidence, despite court's failure to explicitly state that jury was not required to sentence defendant to death upon finding of at least one aggravating factor, upon jury's request for clarification of instructions.

6. Criminal Law ⇐1213.8(8)

The Eighth Amendment requires that a capital jury be able to consider and give effect to all relevant mitigating evidence offered by the defendant. U.S.C.A. Const. Amend. 8.

7. Criminal Law ⇐1208.1(5)
Homicide ⇐357(1)

Evidence about the defendant's background and character is necessary for the sentencer to make an individualized assessment of the appropriateness of the death penalty.

8. Criminal Law ⇐822(1)

In determining the validity of a challenged jury instruction, the instruction may not be judged in artificial isolation, but must be viewed in the context of the overall charge.

9. Habeas Corpus ⇐383

State prisoner's claim that trial court erred by denying his motion for expert assistance in fields of pathology and ballistics was cognizable on federal habeas review, even if state supreme court reached no federal constitutional issue with respect to that claim, where prisoner's brief on direct appeal to state supreme court clearly alleged that denial of expert assistance violated the Fifth, Sixth, and Fourteenth Amendments. U.S.C.A. Const.Amends. 5, 6, 14.

10. Habeas Corpus ⇐452, 453

A federal court may grant habeas relief only on the ground that the petitioner is in custody in violation of the Constitution or laws or treaties of the United States; therefore, when a petitioner's claim rests solely upon an interpretation of state case law and statutes, it is not cognizable on federal habeas review. 28 U.S.C.A. § 2254(a).

11. Habeas Corpus ⇐319.1, 380.1

A federal habeas court cannot hear a petitioner's federal claims unless he has first exhausted state remedies, which requires that the petitioner fairly present the substance of his federal claim to the state courts. 28 U.S.C.A. § 2254(b, c).

12. Habeas Corpus ⇐385

Habeas petitioner's claim that state trial court erred by denying his motion for expert assistance in fields of pathology and ballistics was not addressed by state supreme court on direct appeal, so habeas court would not review claim under standards of Antiterrorism and Effective Death Penalty Act (AEDPA), but would

"adequately satisfies the Guidelines' goals relating to deterrence, retribution, and incapacitation." *Pitts*, 973 F.Supp. at 584. The court did not indicate a belief that it was foreclosed from considering Pitts's post-conviction cooperation. In fact, the court did consider various excuses offered by Pitts and found that they "can never justify or mitigate his actions. Even to assert such excuses is a further affront." *Id.* at 584–85.

review claim de novo because it required court to apply a legal standard to a given set of facts. 28 U.S.C.A. § 2254(d).

13. Habeas Corpus ⇐380.1

The fact that the state court did not address a petitioner's federal constitutional claim does not render his claim unreviewable on federal habeas if he demonstrates that the state court had a fair opportunity to address the claim.

14. Criminal Law ⇐1077.1(1)

Finding that state defendant was entitled to expert assistance at trial in fields of pathology and ballistics would require announcement of new rule, for purpose of *Teague*'s antiretroactivity principles, because, at time defendant's conviction became final, Supreme Court precedent required only that indigent defendant be appointed psychiatric experts when defendant's sanity was at issue.

15. Courts ⇐100(1)

Habeas Corpus ⇐461

Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions, which are new rules that place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe and watershed rules of criminal procedure that significantly improve the accuracy of the factfinding procedure and implicate the fundamental fairness of the trial.

16. Habeas Corpus ⇐461

In general, a case announces a new rule, for purpose of *Teague* antiretroactivity principles, if the result was not dictated by precedent existing at the time the defendant's conviction became final, and a petitioner cannot receive federal habeas relief unless reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to rule in his favor.

17. Habeas Corpus ⇐461

In determining whether petitioner seeks a new rule on collateral review, for purpose of *Teague*'s antiretroactivity principles, court first should determine date on which petitioner's conviction became final, and then consider whether state court considering petitioner's claim at that time would have felt compelled by existing precedent to conclude that rule he sought was required by the Constitution; if not, then rule is new, and, if rule is determined to be new, final step in *Teague* analysis requires court to determine whether rule nonetheless falls within one of *Teague*'s narrow exceptions.

18. Criminal Law ⇐1077.1(1)

Government, upon request, must provide indigent defendants with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners; although the government need not purchase for the indigent defendant all the assistance that a wealthier defendant might buy, fundamental fairness requires that indigent defendants have an adequate opportunity to present their claims fairly within the adversary system.

19. Courts ⇐100(1)

Retroactive application of Virginia Supreme Court's *Husske* decision, holding that indigent defendant may be entitled to appointment of nonpsychiatric experts, to determine that defendant was entitled to expert assistance in fields of pathology and ballistics would violate *Teague*'s antiretroactivity principles, because rule did not amount to watershed rule of criminal procedure that would significantly improve accuracy of factfinding procedure and implicate fundamental fairness of trial.

20. Habeas Corpus ⇐490(3)

Finding that second interrogation of defendant, after defendant had initially cut off questioning during first interrogation, scrupulously honored defendant's right to cut off questioning was neither contrary to nor unreasonable application of Supreme

Court's *Mosley* decision, and thus did not warrant habeas relief; although both interrogations concerned the same crime, defendant received full *Miranda* warnings during first interrogation, initial interrogation ceased immediately once defendant invoked his right to cut off questioning, over ten hours passed between time defendant invoked his right to cut off questioning and the second interrogation, and defendant was asked if he remembered warnings given at first interrogation.

21. Criminal Law ⇐412.1(4)

There is no bright-line test to determine whether a suspect's right to cut off questioning was "scrupulously honored," for purpose of determining whether resumption of questioning was permissible after suspect in custody had indicated that he wished to remain silent; instead, the touchstone is whether a review of the circumstances leading up to the suspect's confession reveals that his right to cut off questioning was fully respected.

22. Criminal Law ⇐412.1(4)

A significant period of time between interrogations does not require a durational minimum, in determining whether second interrogation sufficiently honored defendant's right to cut off questioning; instead, a significant period of time is a function of to what degree the police persisted in repeated efforts to wear down the suspect's resistance and make him change his mind.

23. Criminal Law ⇐519(9)

Where other factors indicate that a defendant's right to cut off questioning was scrupulously honored, the mere fact that a second interrogation involves the same crime as the first interrogation does not necessarily render a confession derived from the second interrogation unconstitutionally invalid.

24. Habeas Corpus ⇐401, 404, 422

Under doctrine of procedural default, a federal habeas court may not review a claim that a state court has found to be clearly and expressly defaulted under an independent and adequate state procedural rule unless the prisoner can demonstrate cause for the default and prejudice resulting therefrom or demonstrate that a failure to consider the claims will result in a fundamental miscarriage of justice.

25. Habeas Corpus ⇐422

A state rule is "adequate" to support finding of procedural default in habeas proceeding if it is firmly established and regularly and consistently applied by the state court, and rule is "independent" if it does not depend on a federal constitutional ruling.

See publication Words and Phrases for other judicial constructions and definitions.

26. Habeas Corpus ⇐401

Under the miscarriage of justice doctrine, a writ of habeas corpus may be granted even without a showing of cause for procedural default if a constitutional violation has probably resulted in the conviction of someone who is actually innocent, and, to show "actual innocence" of the death penalty in a capital case, a petitioner must show by clear and convincing evidence that but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.

27. Habeas Corpus ⇐403

Claims which state supreme court declined to address on ground that defendant failed to register relevant objections at trial, pursuant to state procedural rule, were procedurally defaulted because that rule was firmly established and was regularly and consistently applied by that state's courts, even if it was not applied in a few cases. Va.Sup.Ct.Rules, Rule 5:25.

28. Habeas Corpus ⇐374.1, 403

Dismissal of federal habeas petitioner's claims by state supreme court on direct appeal, based on his failure to brief or argue alleged errors, provided adequate and independent state ground to bar fed-

eral review, despite petitioner's claim that court's 50–page brief limit physically prevented him from presenting all claimed errors to that court, as petitioner had opportunity to present his claims, and state had regularly and consistently refused to consider claims not briefed or argued on direct appeal. Va.Sup.Ct.Rules, Rule 5:26(a).

29. Habeas Corpus ⇐405.1

Page limit imposed by State Supreme Court on briefs for direct appeal from criminal conviction did not amount to cause for defendant's default of claims which he chose not to brief before that court, so claims were not cognizable on federal habeas review, as page limit was reasonable and was consistently applied. Va.Sup.Ct.Rules, Rule 5:26(a).

30. Habeas Corpus ⇐405.1

The existence of cause for a procedural default that would permit federal habeas review must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's effort to comply with the state's procedural rule.

31. Habeas Corpus ⇐380.1

Defendant's presentation of claims in his original brief on direct appeal to state supreme court did not preserve those claims for purpose of federal habeas review, where claims were subsequently cut from brief that was ultimately filed with court, due to court's page limits. Va.Sup.Ct.Rules, Rule 5:26(a).

32. Habeas Corpus ⇐363, 378

To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court, although a claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it; thus, the exhaustion requirement is also satisfied when a state procedural rule would bar consideration of the unexhausted claim if the claim was presented to the state court.

33. Constitutional Law ⇐306(6)
Habeas Corpus ⇐406

Alleged ineffective assistance of counsel for petitioner on his state habeas petition could not constitute cause to excuse petitioner's defaulted claim that trial counsel was ineffective, because petitioner had no constitutional right to counsel in state habeas proceedings, and petitioner could not claim entitlement to such counsel under guise of due process clause. U.S.C.A. Const.Amends. 6, 14.

34. Habeas Corpus ⇐406

Ineffective assistance of counsel may constitute cause for a procedural default under certain circumstances, but, for an attorney error to constitute cause, a petitioner must first possess a constitutional right to assistance of counsel. U.S.C.A. Const.Amend. 6.

35. Habeas Corpus ⇐486(5)

Although a petitioner may claim a due process violation occurring in his state habeas proceeding, he may not premise this claim solely on the alleged ineffective assistance of state habeas counsel. U.S.C.A. Const.Amends. 6, 14.

ARGUED: Timothy Meade Richardson, Huff, Poole & Mahoney, P.C., Virginia Beach, Virginia, for Appellant. Robert H. Anderson, III, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellee. ON BRIEF: Glen A. Huff, Huff, Poole & Mahoney, P.C., Virginia Beach, Virginia; Sterling H. Weaver, Sr., Portsmouth, Virginia, for Appellant. Mark L. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellee.

Before WILKINSON, Chief Judge, and HAMILTON and WILLIAMS, Circuit Judges.

Application for a certificate of appealability denied and petition dismissed by published opinion. Judge WILLIAMS wrote the opinion, in which Chief Judge WILKINSON and Judge HAMILTON joined.

OPINION

WILLIAMS, Circuit Judge:

On October 21, 1993, a Commonwealth of Virginia jury convicted Lonnie Weeks, Jr., of the capital murder of Virginia State Trooper Jose Cavazos. Following the jury's determination that Weeks's conduct satisfied the "vileness" aggravating factor, the trial court sentenced Weeks to death. After exhausting all available state remedies, Weeks petitioned the United States District Court for the Eastern District of Virginia for habeas corpus relief. *See* 28 U.S.C.A. § 2254 (West 1994 & Supp.1998). The district court dismissed his petition. Weeks subsequently filed an application for a certificate of appealability with this Court raising numerous constitutional claims of error. Weeks argues, *inter alia*, that the trial court's refusal to clarify its capital sentencing instruction to the jury after they indicated confusion with the instruction prevented the consideration of relevant mitigating evidence in violation of the Eighth and Fourteenth Amendments, that the trial court's refusal to appoint ballistics and pathology experts violated his due process rights under the Fourteenth Amendment, and that the Supreme Court of Virginia's refusal to suppress his confession to the murder of Trooper Cavazos violated his Fifth and Fourteenth Amendment rights. After reviewing the record and briefs and hearing oral argument, we conclude that Weeks has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C.A. § 2253(c)(2) (West Supp.1998). Accordingly, we deny his application for a certificate of appealability and dismiss his petition.

I.

The undisputed facts of this case, as recited by the Supreme Court of Virginia, are as follows:

In early February 1993, [Weeks], who was age 20, a North Carolina resident, and on probation for a 1992 drug conviction, participated in the burglary of a residence in the Fayetteville, North Carolina area. During the course of that crime, [Weeks] obtained a set of keys to a 1987 Volkswagen Jetta automobile parked at the residence, and stole the vehicle. Later that month, [Weeks] drove the vehicle to Washington, D.C., intending to sell it or trade it for drugs. [Weeks] carried in the vehicle a Glock Model 17, nine millimeter, semi-automatic pistol loaded with hollow-point bullets. According to the testimony, the bullets were designed for police use, not target practice or hunting; this type of bullet is referred to as a "man stopper."

During the late evening of February 23, [Weeks] was riding as a passenger in the vehicle being driven by his uncle, 21–year–old Lewis J. Dukes, Jr., a resident of the District of Columbia. The pair was traveling en route from Washington to Richmond southbound on Interstate Route 95.

Around midnight, Trooper Cavazos was operating radar from his marked police vehicle parked in the highway medium monitoring southbound traffic. The Volkswagen driven by Dukes passed the trooper's position at a high rate of speed. The officer activated his vehicle's emergency lights and proceeded to chase the vehicle occupied by [Weeks]. After traveling a brief distance, and passing other vehicles by driving on the right shoulder of the highway, Dukes brought the car to a stop on the Dale City exit ramp, in a dark, remote area.

The trooper pulled his patrol car to a stop behind the Volkswagen, which he approached on foot on the driver's side. Upon the officer's request, Dukes alight-

ed and was standing toward the left rear of the Volkswagen when the trooper asked [Weeks] to step out of the vehicle.

[Weeks] complied with the officer's request and alighted on the right side of the vehicle as the trooper was near the left side. As [Weeks] left the vehicle he was carrying the fully loaded pistol. He then fired at least six bullets at the officer, two of which entered his body beside the right and left shoulder straps of the protective vest the trooper was wearing. The officer was immediately rendered unconscious and fell to the pavement, dying within minutes at the scene with his police weapon in its "snapped" holster.

[Weeks], with Dukes as a passenger, then drove the Volkswagen from the scene and parked it on the lot of a nearby service station. [Weeks] returned to the scene of the crime on foot and retrieved Dukes' District of Columbia driver's license that had been dropped on the pavement. [Weeks] rejoined Dukes, and they were found by police shortly thereafter in the parking lot of a nearby motel.

. . . . . .

About 2:45 a.m., after [Weeks] had been with [the Prince William County police officer who had first encountered Weeks in the motel parking lot] for about two hours, state police officers arrived to question [Weeks] and Dukes. Near 3:00 a.m., state police Special Agent J.K. Rowland met [Weeks] in the motel lobby. Rowland "explained to him that he was not under arrest" and asked [Weeks] "if he would like to talk ... about what he had seen up on Interstate 95." [Rowland], who ... testified [that Weeks] was "free to leave at that time," conducted an interview with [Weeks] in private in one of the motel rooms.

. . . . . .

[A]s Rowland questioned [Weeks] in the motel room, Rowland became "more and more suspicious" of[Weeks]. Even though [Weeks] "was free to leave" at that point, Rowland advised [Weeks] of his constitutional rights according to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as a precaution at 7:40 a.m. [Weeks] then exercised his right to remain silent and wrote, "Do not want to discuss case any further," on the "Advice of Rights" form that he signed. Rowland honored this request, and ceased questioning.

At 7:50 a.m., Rowland was advised by another investigator that Dukes had just stated that [Weeks] shot the trooper. Rowland arrested [Weeks] at 7:52 a.m.

Subsequently, [Weeks] was taken before a magistrate and then to the Adult Detention Center in Manassas. Later that morning, classification officers in the jail routinely questioned [Weeks] about his physical and mental state; no attempt was made to elicit information about the crime. During the interview, [Weeks] indicated that he was considering suicide because he had shot the trooper. [Weeks] also voluntarily wrote a letter to a jail officer admitting the killing and expressing remorse. [Weeks] does not contest either of these admissions but attacks the constitutional validity of the following interview.

Near 6:00 p.m. on February 24, [Weeks] was brought to the lounge of the local prosecutor's office where Rowland again interviewed him; additional information had been developed by the police during the day between the termination of the first interview and the beginning of the second interview. Rowland asked [Weeks], "Do you remember the rights I read to you earlier today?" to which[Weeks] responded affirmatively. Rowland proceeded "to summarize the investigation through the course of the day's events to that point in time."

Among other things, Rowland told [Weeks] that an eyewitness to the shooting had made a positive identification of

him as the assailant. A witness actually had identified [Weeks] as a person she saw at the scene after the homicide, but she had not witnessed the shooting. At the conclusion of Rowland's summary, he said to [Weeks], "This is your opportunity to provide your explanation as to what happened at the shooting scene." [Weeks] responded, "Yes, I was packing." The officer knew that "packing" meant "carrying a firearm."

[Weeks] then confessed to the trooper's murder. [Weeks] stated that when the trooper asked him to get out of the Volkswagen, he picked up the pistol and "thought about throwing it away." Instead, he saw the trooper put his hand down toward his service revolver. [Weeks] said he then "panicked" and shot the victim "several times rapidly." [Weeks] stated that he drove, with Dukes as a passenger, to the service station, placing the pistol under the front floor mat of the Volkswagen. This interview lasted about one hour during which [Weeks] readily answered questions and did not invoke his right to remain silent or any other constitutional right.

Weeks v. Commonwealth, 248 Va. 460, 450 S.E.2d 379, 382–86 (Va.1994).

After a jury trial in the Circuit Court of Prince William County, Virginia, Weeks was convicted of the capital murder of Cavazos pursuant to Va.Code Ann. § 18.2-31(5) (Michie Supp.1998).[1] Based on its finding—made during the sentencing phase of Weeks's trial—that Weeks's conduct was outrageously or wantonly vile in that it involved depravity of mind and/or aggravated battery to the victim beyond the minimum necessary to commit the murder, *see* Va.Code.Ann. § 19.2-264.4(C) (Michie 1995), the jury recommended that Weeks be sentenced to death. After conducting a post-trial hearing pursuant to Va.Code. Ann. § 19.2-264.5 (Michie 1995), the Circuit Court of Prince William County followed the jury's recommendation and sentenced Weeks to death. On direct appeal, the Supreme Court of Virginia upheld Weeks's conviction and death sentence. *See Weeks*, 248 Va. 460, 450 S.E.2d 379. The Supreme Court of the United States denied Weeks's petition for a writ of certiorari. *See Weeks v. Virginia*, 516 U.S. 829, 116 S.Ct. 100, 133 L.Ed.2d 55 (1995).

Weeks requested that the Circuit Court of Prince William County appoint counsel to assist him in preparing a state habeas petition. On October 10, 1995, the circuit court granted this request and Weeks's state habeas counsel filed a petition for habeas corpus. On December 1, 1995, state habeas counsel withdrew the petition from the circuit court after learning on that day that the appropriate court with which to file the petition was the Supreme Court of Virginia, because that court has sole jurisdiction over habeas petitions in death-sentence cases. State habeas counsel immediately mailed the petition by regular mail to the Supreme Court of Virginia on December 1, the last day for filing. The petition was filed on December 4, 1995.

On January 11, 1996, the Commonwealth filed a motion to dismiss Weeks's petition as jurisdictionally barred due to untimeliness under Va. Code § 8.01-654.1 and Rule 5:7A(a) of the Rules of the Supreme Court of Virginia. In its motion, the Commonwealth argued that the petition was not timely filed because the Supreme Court of Virginia does not accept pleadings sent in the mail on the last day for filing unless they are sent by certified or registered mail. On that same day, the Commonwealth also filed a motion to dismiss the petition on substantive grounds. On March 15, 1996, the Supreme Court of

1. Weeks also pleaded guilty to the use of a firearm in the commission of a murder and a related grand larceny charge, pursuant to Va. Code Ann. §§ 18.2-53.1 and 18.2-95 (Michie 1996 & Supp.1998), respectively, for which he was sentenced to a total of thirteen years in prison. These charges are not at issue on appeal.

Virginia dismissed the petition as jurisdictionally barred due to untimeliness.

On April 11, 1996, Weeks filed a petition for rehearing with the Supreme Court of Virginia. Weeks subsequently filed a purportedly *pro se* motion seeking the dismissal of his state habeas attorney for an alleged conflict of interest and leave to file a second habeas petition after the appointment of new counsel. That motion was denied by the Supreme Court of Virginia on May 31, 1996. One week later, on June 7, 1996, the Supreme Court of Virginia denied Weeks's petition for rehearing. On June 28, 1996, the Circuit Court of Prince William County entered an order setting Weeks's execution for August 19, 1996.

On August 14, 1996, Weeks filed a motion in the United States District Court for the Eastern District of Virginia requesting appointment of counsel, a stay of execution, and leave to proceed *in forma pauperis*. These motions were granted. Weeks was ordered to file his petition for writ of habeas corpus on or before February 7, 1997.

Weeks submitted his petition for a writ of habeas corpus in the district court on February 7, 1997. The matter was referred to a magistrate judge for the preparation of a report and recommendation pursuant to 28 U.S.C.A. § 636(b)(1)(B) and (C) (West 1993) and Rule 72(b) of the Federal Rules of Civil Procedure. On July 30, 1997, the magistrate judge filed a report and recommendation, recommending that the petition be denied and dismissed. By opinion and final order of April 1, 1998, the district court granted the Commonwealth's motion for summary judgment and denied and dismissed Weeks's petition for a writ of habeas corpus in its entirety. *Weeks v. Angelone*, 4 F.Supp.2d 497 (E.D.Va.1998). On April 15, 1998, Weeks moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). The district court denied this motion on June 19, 1998. On July 17, 1998, Weeks filed a timely notice of appeal. On October 16, 1998, Weeks filed an application for a certificate of appealability with this Court pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure.

On appeal, Weeks contends that he is entitled to habeas relief on the following grounds: (1) the trial court's failure to instruct the jury clearly that they were obliged to consider relevant mitigating evidence before making their sentencing determination created a reasonable probability that the jury interpreted the sentencing instructions in a way that prevented the consideration of constitutionally relevant evidence; (2) the trial court's refusal to appoint ballistics and pathology experts deprived him of his constitutional rights; (3) the trial court's failure to suppress evidence derived in violation of his Fifth Amendment right against self-incrimination deprived him of due process; (4) Rule 5:25 is not an adequate procedural bar to his claims that were not raised at trial; (5) the fifty-page brief limit imposed by the Supreme Court of Virginia excuses the procedural default of claims not briefed on direct appeal; and (6) his state habeas counsel's conflict of interest constituted a violation of due process that excused the procedural default of his ineffective-assistance-of-trial-counsel claims. We address Weeks's arguments in turn.

II.

[1, 2] The parties agree that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104–132, 110 Stat. 1214, governs this case.[2] For a claim that was adjudicated on the merits in state court proceedings, this Court will not issue a writ of habeas corpus under the AEDPA unless (a) the state court decision is in "square conflict" with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, "the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." *Green v. French*, 143 F.3d 865, 870 (4th Cir.1998). "In other words, *habeas* relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Id.* When a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits, however, our review of questions of law and mixed questions of law and fact is de novo. *See Jones v. Jones*, 163 F.3d 285, 299–300 (5th Cir. 1998) (applying pre-AEDPA de novo standard of review to claims of ineffective assistance of counsel that were properly raised, but not adjudicated on merits in state court).

2. The AEDPA prohibits federal habeas relief on any claim "adjudicated on the merits in State court proceedings," unless that adjudication resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254(d) (West Supp. 1998).

III.

First, Weeks argues that the trial court prevented the jury from considering relevant mitigating evidence in violation of *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). Specifically, Weeks points to the failure of the trial court, in response to a specific jury request for clarification, to instruct the jury clearly that it was not required to sentence Weeks to death upon finding at least one aggravating factor. In *Boyde*, the Supreme Court held that the proper inquiry into whether capital jury instructions satisfy the Eighth Amendment requirement that a sentencer give effect to mitigating evidence is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.

A.

During the penalty phase of Weeks's trial, the trial court gave the jury a lengthy sentencing instruction (Instruction # 2).[3] The trial court denied Weeks's proffered instruction, C1, which instructed the jury that it had the option to give effect to the mitigating evidence and sentence Weeks to life in prison even if it found the Commonwealth had proved one or both of the aggravating factors beyond

3. Instruction # 2 read as follows:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than $100,000. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> 1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
> 2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.
>
> If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

(J.A. at 264.)

a reasonable doubt. During its penalty phase deliberations, the jury asked the court whether it was their duty to issue the death penalty if they found that Weeks was guilty of one of the aggravating factors, or whether they must decide whether or not to issue a death sentence even after finding that one of the aggravating factors had been met. Rather than issuing a clarifying instruction, the trial court instructed the jury by written response to see the second paragraph of Instruction # 2, which read as follows:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you *may* fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you *shall* fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

(J.A. at 264 (emphases added).) The trial court overruled Weeks's objection and request that the jury be instructed that it could impose a life sentence upon finding one or both aggravating factors based upon its belief that the jurors "just have to be drawn to that paragraph to find their answer." (J.A. at 1344.) Following several more hours of deliberation, the jury sentenced Weeks to death.

[3] The Supreme Court of Virginia rejected Weeks's claim, contained in assignment of error no. 44, that the trial court's actions prevented the jury from considering relevant mitigating evidence on the ground that Weeks "effectively presents no argument in support of" his claim. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 383 (1994). The Commonwealth argues that this dismissal is procedural and that Weeks has procedurally defaulted any objection to the trial court's response to the jury's question about its sentencing options.

We disagree with the Commonwealth's characterization. First, in the sentence at the end of the same paragraph that states that Weeks "effectively presents no argument in support of," *inter alia*, assignment of error no. 44, the Supreme Court of Virginia concluded, "We have considered these so-called arguments and *find no merit* in any of [them]." *Id.* (emphasis added). Second, the Supreme Court of Virginia stated the following near the end of its opinion: "[D]efendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. We have considered all the arguments in support of these issues and conclude that *none has any merit*." *Id.* at 390 (emphasis added). Because Weeks's jury made two inquiries and Weeks's brief to the Supreme Court of Virginia made two assignments of error (nos. 43 and 44) regarding the court's response to jury instructions, the Supreme Court of Virginia's use of the term "inquiries," must have referred to both assigned errors nos. 43 and 44. The Supreme Court of Virginia therefore adjudicated assigned error no. 44 on the merits, allowing us to review this claim in a federal habeas proceeding.[4] *See Wright v. Angelone*, 151 F.3d 151, 156–57 (4th Cir. 1998) (holding that a perfunctory decision constitutes an adjudication on the merits).

[4] Where, as here, the state supreme court has adjudicated a claim on the merits but has given no indication of how it reached its decision, a federal habeas court must still apply the AEDPA standards of review. *See id.* A state court's perfunctory decision is reasonable if it " 'is at least minimally consistent with the facts and circumstances of the case.' " *Id.* at 157 (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir.), *cert. denied*, — U.S. —, 118 S.Ct. 72, 139 L.Ed.2d 32 (1997)).

4. The district court also concluded that the Supreme Court of Virginia dismissed this claim on the merits. *See Weeks v. Angelone*, 4 F.Supp.2d 497, 536 (E.D.Va.1998).

Therefore, the writ will not issue unless we determine that the Supreme Court of Virginia's disposition of this claim was either contrary to federal law as determined by the Supreme Court or an application or interpretation of Supreme Court precedent "that reasonable jurists would all agree," *Green v. French*, 143 F.3d 865, 870 (4th Cir.1998), was not " 'minimally consistent with the facts and circumstances of the case,' " *Wright*, 151 F.3d at 157 (quoting *Hennon*, 109 F.3d at 335).

B.

[5–8] The Eighth Amendment requires that a capital jury be able to consider and give effect to all relevant mitigating evidence offered by the petitioner. *See Eddings v. Oklahoma*, 455 U.S. 104, 112–14, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Evidence about the petitioner's background and character is necessary for the sentencer "to make an individualized assessment of the appropriateness of the death penalty." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In determining the validity of a challenged instruction, the instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). In *Boyde*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316, the Supreme Court fleshed out these principles, holding that the proper inquiry in cases where a capital sentencing instruction allegedly prevents the consideration of mitigating evidence is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380. Applying this rule to the petitioner's case in *Boyde*, the Supreme Court concluded that there was not a reasonable likelihood that the challenged instruction prevented the consideration of mitigating evidence, in light of the fact that the instruction told the jury that "you shall" consider "[a]ny other circumstance which extenuates the gravity of the crime" and that the jury was presented with four days of evidence at the penalty phase relating to Boyde's background and character. *Id.* at 381; *see id.* at 381–84.

Applying the *Boyde* inquiry in *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998), the Supreme Court upheld the constitutionality of the Virginia pattern capital sentencing instruction, the very instruction at issue in this case, against a challenge on Eighth and Fourteenth Amendment grounds. The Supreme Court first noted that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. However, the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan*, 118 S.Ct. at 761 (internal citations omitted). The Court further held, in pertinent part:

> The instruction did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on "all the evidence," the instruction afforded jurors an opportunity to consider mitigating evidence. The instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they "may fix" the penalty at death, but directed that if they believed that all the evidence justified a lesser sentence then they "shall" impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved.

Id. at 762. The Supreme Court concluded that "[e]ven were we to entertain some doubt as to the clarity of the instructions," the two days of testimony related to mitigating evidence and the extensive arguments of the defense and the prosecution on the effect such evidence should be given in the sentencing determination demon-

strated that there was "not a reasonable likelihood" that the instructions had precluded the jury's consideration of Buchanan's mitigating evidence in violation of *Boyde*. *Id.* at 762–63.

Given the Supreme Court's decision in *Buchanan*, Weeks is reduced to arguing that the trial court's failure to clarify a constitutionally sufficient instruction violated his Eighth and Fourteenth Amendment rights because the jury's question placed the trial court on notice that it was reasonably likely that the jury would apply the instruction in a way that prevented the consideration of mitigating evidence. We find this argument to be without merit. Following the jury's finding of guilt on the capital murder charge, Weeks presented mitigating evidence as to his religious upbringing, the abrupt manner in which the events surrounding the shooting unfolded, and his feelings of remorse. Defense counsel argued extensively that the jury should give this mitigating evidence great weight in the sentencing determination. "[W]e think it unlikely that reasonable jurors would believe the court's instructions transformed all of this favorable testimony into a virtual charade." *Boyde*, 494 U.S. at 383 (internal quotation marks omitted). In fact, the verdict form the jury returned specifically noted that in fixing Weeks's punishment at death, the jury "considered the evidence in mitigation of the offense." (J.A. at 258, 1345–46.) At the conclusion of the penalty phase, following the announcement of the verdict in open court, each member of the jury was polled and confirmed the verdict.

Under these circumstances, we believe that no reasonable juror would have understood the sentencing instruction to preclude the consideration of mitigating evidence even upon a finding of an aggravating factor. The Supreme Court of Virginia's summary disposition of this claim, therefore, was neither contrary to federal law as interpreted by the Supreme Court of the United States nor an application or interpretation of *Boyde* "that reasonable jurists would all agree," *Green*, 143 F.3d at 870, was not "minimally consistent with the facts and circumstances of the case," *Wright*, 151 F.3d at 157.[5]

IV.

Next, Weeks argues that the trial court's denial of his request for appointed ballistics and pathology experts violated his rights under the Fourteenth Amendment.[6] As support for his argument, Weeks cites the Supreme Court of Virginia's opinion in *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (Va.1996), *cert. denied*, 519 U.S. 1154, 117 S.Ct. 1092, 137 L.Ed.2d 225 (1997), decided one year after Weeks's conviction became final. In *Husske*, the Supreme Court of Virginia held that in certain instances, indigent defendants must be provided with non-psychiatric experts as part of the "basic tools of an adequate defense." *Id.* at 925.

A.

[9] Prior to the trial, Weeks filed a motion for expert assistance in the fields of ballistics and pathology and, simultaneously, asked that his motion be treated pursuant to 18 U.S.C.A. § 3006A(e) (West Supp. 1998), which requires that an indigent's request for expert assistance in federal court be treated ex parte. Weeks contended that expert assistance was needed to evaluate the evidence and present a

5. Even if we were to apply the pre-AEDPA standard of de novo review, *see Howard v. Moore*, 131 F.3d 399, 406 (4th Cir.1997) (en banc), *cert. denied*, — U.S. —, 119 S.Ct. 108, 142 L.Ed.2d 86 (1998), we would conclude, for the reasons discussed, that the trial court's actions did not prevent the jury's consideration of mitigating evidence in violation of *Boyde*.

6. Because Weeks frames this issue in his brief in terms of the fairness of the trial he received, we utilize a due process analysis in addressing his claim. *See Moore v. Kemp*, 809 F.2d 702, 709 n. 6 (11th Cir.1987) (en banc).

defense on the issues of premeditation in the guilt phase and vileness in the sentencing phase. Weeks contended that because he must demonstrate to the court why such expert assistance is required, the hearing on the motion should be ex parte to prevent the prosecution from learning the theory of the defense. After hearing argument of counsel, the trial court entered an order of September 28, 1993, denying both the motion and Weeks's request for an ex parte hearing on the motion.

On direct appeal, Weeks raised numerous assignments of error. In his 11th assignment of error, Weeks argued that the trial court erred by denying his application to be heard ex parte on his motion for expert assistance in the fields of pathology and ballistics. In his 12th assignment of error, Weeks argued that the trial court erred by denying his motion for expert assistance in the field of pathology and ballistics. The Supreme Court of Virginia declined to grant relief on either claim. *See Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (Va.1994).

[10, 11] The Commonwealth argues that the Supreme Court of Virginia's disposition of Weeks's 12th assignment of error, *i.e.*, his claim for appointment of experts, is not cognizable on federal habeas because it "reached no federal constitutional issue, for the simple reason that Weeks advanced no such claim." (Appellee's Br. at 16–17.) A federal court may grant habeas relief "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a) (West 1994). Therefore, when a petitioner's claim rests solely upon an interpretation of state case law and statutes, it is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Moreover, a federal habeas court cannot hear a petitioner's federal claims unless he has first exhausted state remedies, *see* 28 U.S.C.A. § 2254(b), (c) (West 1994 & Supp. 1998), which requires that the petitioner fairly present the substance of his federal claim to the state courts, *see Duncan v. Henry*, 513 U.S. 364, 365–66, 115 S.Ct. 887, 130 L.Ed.2d 865(1995) (per curiam) (reversing grant of writ of habeas corpus where petitioner, on direct appeal in state court, claimed that evidentiary ruling violated state law but did not claim violation of any federal constitutional right).

Applying these principles to the facts of this case, we find the Commonwealth's argument unpersuasive. Although the Commonwealth correctly noted that the Supreme Court of Virginia did not discuss a federal constitutional issue in addressing Weeks's claim, it is the petitioner's argument to the court rather than the court's decision that is dispositive. Weeks's brief on direct appeal clearly alleged that the denial of expert assistance constituted violations of the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States. Because Weeks presented the substance of a federal constitutional claim for experts to the Supreme Court of Virginia, we may review this claim in a federal habeas proceeding.

B.

[12, 13] Weeks argues that the Supreme Court of Virginia never adjudicated the merits of his claim, and, therefore, this Court must review it de novo. Specifically, Weeks alleges that the Supreme Court of Virginia dismissed his application for an ex parte hearing on his motion for expert assistance in the fields of pathology and ballistics, the 11th assignment of error, without addressing his actual request for such expert assistance, the 12th assignment of error. With regard to these two assignments of error, the Supreme Court of Virginia found the following:

Associated with defendant's claim of error relating to the request for a scien-

tific investigation is the complaint that the trial court erred by denying his request to be heard ex parte on his motion for expert assistance in the fields of pathology and ballistics, and for denial of the request for appointment of such experts. Defendant asked that his motion for funding for expert assistance "be treated under the same procedure as required by Title 18 USC 3006A(e) in Federal Court." There is no merit to this contention.

We already have decided that a defendant charged with capital murder is not entitled to an ex parte hearing on his motion for expert assistance. *Ramdass v. Commonwealth*, 246 Va. 413, 422, 437 S.E.2d 566, 571 (1993), *rev'd on other grounds sub nom. Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). In addition, we specifically have refused to apply the federal statute to state capital murder prosecutions.

Weeks, 450 S.E.2d at 388. Weeks's claim rests on the arguable point that when the Supreme Court of Virginia stated that "[t]here is no merit to this contention," the singular term "this contention" only referred to Weeks's application for an ex parte hearing and not to his claim for experts. Weeks's interpretation is supported by the preceding sentence, in which the Supreme Court of Virginia ruled that Weeks asked that his request for an ex parte hearing be treated under the same procedure as required by 18 U.S.C.A. § 3006A(e). Weeks's argument is also supported by the subsequent paragraph, in which the Supreme Court of Virginia exclusively discussed Weeks's application to be heard ex parte on his motion for expert assistance. The fact that the state court did not address a petitioner's federal constitutional claim does not render his claim unreviewable on federal habeas if he demonstrates that the state court had a fair opportunity to address the claim. *Cf. Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997) (holding that a federal claim in a state court judgment on which the state court was silent will not be reviewed unless it was properly presented to the state court).

We agree with Weeks and conclude that the Supreme Court of Virginia failed to address his request for expert assistance in the fields of pathology and ballistics on the merits. Thus, we do not apply the standards of review set forth in 28 U.S.C.A. § 2254(d) (West Supp.1998), which requires that a claim be "adjudicated on the merits in State court proceedings." Because Weeks's request for experts requires us to apply a legal standard to a given set of facts, we review his claim de novo.

C.

[14–16] Even though Weeks's claim for expert assistance is not subject to 28 U.S.C.A. § 2254(d), we still must determine whether resolving Weeks's claim for experts in his favor would require this Court to announce a new rule in violation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). *See Green v. French*, 143 F.3d 865, 874 (4th Cir.1998) (holding that antiretroactivity principles of *Teague* apply where limitations of § 2254(d)(1) do not). "Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions."[7] *Penry v. Lynaugh*, 492 U.S. 302, 313, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In general, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. "The principle announced in *Teague* serves to insure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). Thus, a petitioner cannot receive federal habeas relief "unless reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to rule in his favor." *Graham v. Collins*, 506 U.S. 461, 467, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (internal quotation marks omitted).

7. The two exceptions are new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," and "watershed rules of criminal procedure" that significantly improve the accuracy of the factfinding procedure and implicate the fundamental fairness of the trial. *See Teague v. Lane*, 489 U.S. 288, 311–12, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion).

[17] In determining whether a petitioner seeks a new rule on collateral review, a court should proceed in three steps:

> First, the date on which the defendant's conviction became final is determined. Next, the habeas court considers whether "a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by the existing precedent to conclude that the rule [he] seeks was required by the Constitution." If not, then the rule is new. If the rule is determined to be new, the final step in the *Teague* analysis requires the court to determine whether the rule nonetheless falls within one of the two narrow exceptions to the *Teague* doctrine.

O'Dell v. Netherland, 521 U.S. 151, 117 S.Ct. 1969, 1973, 138 L.Ed.2d 351 (1997) (internal citations omitted). Weeks's conviction became final on October 2, 1995, the date the Supreme Court of the United States denied certiorari. We therefore must determine whether as of October 2, 1995, a Virginia state court would have been compelled by existing precedent to conclude that a rule establishing a right to appointment of experts in pathology and ballistics for indigent criminal defendants was required by the Constitution.

[18] Supreme Court precedent establishes the principle that the government, upon request, must provide indigent defendants with the "basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971); *see Douglas v. California*, 372 U.S. 353, 357–58, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Griffin v. Illinois*, 351 U.S. 12, 18–19, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (plurality opinion). Although the government need not purchase for the indigent defendant all the assistance that a wealthier defendant might buy, fundamental fairness requires that indigent defendants have "an adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).[8] In *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court held that as part of the basic tools of an adequate defense, an indigent defendant has a due process right to the appointment of a psychiatrist to assist him in his defense when he "demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." *Id.* at 83. Although there was broad language in *Ake* suggesting application to a variety of circumstances in which an indigent defendant requests expert assistance, its precise holding was limited to the facts at hand. *See id.* at 83. In fact, the Supreme Court soon thereafter declined to extend *Ake*'s holding to the appointment of a criminal investigator, fingerprint expert, and ballistics expert and declined to address the question of "what *if any* showing would [entitle] a defendant to [private non-psychiatric] assistance" as a matter of federal constitutional law. *Caldwell v. Mississip-*

8. Although most of the early Supreme Court decisions in the area of the treatment of indigents in the criminal justice system rested on an equal protection framework, "[d]ue process and equal protection principles converge in the Court's analysis in these cases." *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

pi, 472 U.S. 320, 323 n. 1, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (emphasis added).

We interpret *Ake* and *Caldwell* together to stand for the proposition that due process as of the time Weeks's conviction became final only required that an indigent defendant be appointed psychiatric experts when his sanity is at issue in the trial. Finding in favor of Weeks on his claim therefore would require us to announce a "new rule" of constitutional law in violation of *Teague*. Weeks cites *Husske*, 252 Va. 203, 476 S.E.2d 920, as support for his contention that he is not seeking the announcement of a new rule, but rather the application of an old rule. In *Husske*, the Supreme Court of Virginia noted the following:

> Our research reveals that most courts which have considered the question whether an indigent defendant is entitled to the appointment of a non-psychiatric expert have applied the rationale in *Ake*, and, those courts have held that the Due Process and Equal Protection clauses require the appointment of non-psychiatric experts to indigent defendants depending upon whether the defendants made a particularized showing of the need for the assistance of such experts.

Id. at 925 (citing numerous cases from state and federal courts). The Supreme Court of Virginia continued, "We are of the opinion that *Ake* and *Caldwell*, when read together, require that the Commonwealth of Virginia, upon request, provide indigent defendants with 'the basic tools of an adequate defense,' and, that in certain instances, these basic tools may include the appointment of non-psychiatric experts." *Id.* (internal citation omitted). The Supreme Court of Virginia then held that an indigent defendant may establish an entitlement to appointment of a non-psychiatric expert "by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial." *Id.*

Weeks argues that although the *Husske* decision came out one year after his conviction became final, it provides a good proxy of what the Supreme Court of Virginia would have concluded had it addressed the issue in Weeks's case, and, therefore, application of the *Husske* rule to his case would not involve the application of a "new rule." *See Lambrix v. Singletary*, 520 U.S. 518, 117 S.Ct. 1517, 1529, 137 L.Ed.2d 771 (1997) (holding that case was a "particularly good proxy" for what a reasonable jurist would have thought four years previously, given that the only relevant cases decided in interim were dictated by precedent). We find Weeks's argument to be unpersuasive. The proper inquiry under *Teague* is whether the Supreme Court of Virginia would have been *compelled* by existing precedent at the time that Weeks's conviction became final to hold that Weeks was constitutionally entitled to the appointment of experts in pathology and ballistics, not whether the Supreme Court of Virginia would later be convinced after canvassing cases from other courts that such experts may be required in certain instances. Weeks points to no controlling precedent between *Ake/Caldwell* and *Husske* that would compel the Supreme Court of Virginia to rule in his favor. Neither the mere fact that prior cases lent general support to the conclusion reached in *Husske*, nor Weeks's contention that the Supreme Court of Virginia would have felt compelled (by existing precedent at the time that Weeks's conviction became final) to conclude that the rule he seeks was required by the Constitution, suffices to show that *Husske* was not a new rule. *See Sawyer*, 497 U.S. at 236.

In fact, we have recently indicated that the *Husske* rule is not required by *Ake* and *Caldwell*. In *Gray v. Thompson*, 58 F.3d 59 (4th Cir.1995), this Court considered a habeas petitioner's claim that the Virginia state court's refusal to appoint a private investigator for the defense violated due process. *See id.* at 66. Citing *Caldwell*, we noted that the Supreme Court had flatly declined to resolve the

question of what, if any, showing would entitle an indigent defendant to private non-psychiatric assistance as a matter of federal constitutional law. *See id.* We then concluded that resolving that question "would clearly be breaking new constitutional ground." *Id.* at 66; *see also Jackson v. Ylst*, 921 F.2d 882, 885–86 (9th Cir.1990) (declining to address same question). We see no reason why the holding in *Gray* does not apply to a claim based on a denial of experts in pathology and ballistics. Weeks therefore is requesting this Court to apply the new rule established by *Husske* to his case.

D.

[19] Because Weeks claims the benefit of a new rule, the rule is not applicable to his case unless it falls within one of two narrow exceptions enunciated in *Teague*. Weeks argues that even if *Husske* was a new rule, his request falls under the second exception, which allows retroactive application of a "watershed rule of criminal procedure" that significantly improves the fact finding procedures and implicates the fundamental fairness of the trial. *See Teague*, 489 U.S. at 311. Weeks contends that in light of *Ake* and *Caldwell* it would be fundamentally unfair to conclude that psychiatrists are a basic tool of an adequate defense while non-psychiatric experts are not. In support of his argument, Weeks cites numerous cases in which this Court and others have recognized that due process may entitle an indigent defendant to receive the services of court-appointed independent non-psychiatric experts on request.

We find Weeks's argument to be unpersuasive. Because the second *Teague* exception is directed toward the accurate determination of guilt or innocence, it is "unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313. This Court has recognized that an indigent defendant has a right under the due process clause to the assistance of an expert if a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance. *See Williams v. Martin*, 618 F.2d 1021, 1027 (4th Cir.1980). *Williams* concerned the refusal of the trial court to furnish the defendant with an independent pathologist to serve as an expert witness concerning the cause of the victim's death. *See id.* at 1026. Because there is no doubt as to the cause of Trooper Cavazos's death, we believe that Weeks's claim does not present the "substantial issue" necessary to invoke the *Williams* rule. *See George v. Angelone*, 901 F.Supp. 1070, 1084–85 & n. 8 (E.D.Va.1995) (following *Gray* and holding that petitioner is not entitled as a matter of due process to private investigator to assist defense in countering Government's "vileness" case at sentencing phase). Moreover, because the *Husske* rule recognizing a federal constitutional right to non-psychiatric experts in Virginia state cases upon a particularized showing of such need adds to an existing guarantee of due process, it is not an "absolute prerequisite to fundamental fairness" of the type required by *Teague*'s second exception. *Sawyer*, 497 U.S. at 244.

In sum, we hold that although Weeks's claim for experts in pathology and ballistics was not adjudicated by the state courts, finding a federal constitutional right to such experts upon a particularized showing of need would require us to apply a "new rule" in violation of *Teague*.[9]

9. The relevant standard of review under the AEDPA is even more stringent than *Teague*, because under the AEDPA, a writ will not issue unless a state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C.A. § 2254(d) (West Supp. 1998) (emphasis added). It necessarily follows that if a decision resolving this claim in Weeks's favor is impermissible under *Teague*, such a decision is also impermissible under § 2254(d).

V.

[20] Weeks also argues that the trial court violated his Fifth Amendment right against self-incrimination by refusing to suppress the confession he made to Agent Rowland at the second interrogation. Specifically, Weeks alleges that Agent Rowland's second interrogation failed to "scrupulously honor" Weeks's right to cut off questioning in violation of *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Furthermore, Weeks claims that the constitutional error of introducing his statements made at the second interrogation had a "substantial and injurious effect or influence in determining the jury's verdict." (Appellant's Br. at 24–25.)

The relevant circumstances surrounding Weeks's confession are as follows. At 7:40 a.m. on February 24, 1993, Weeks was read his *Miranda* rights by Agent Rowland, who had become suspicious of him during their conversation. Weeks invoked his right to remain silent and questioning immediately ceased. Upon learning several minutes later that the driver of the car in which Weeks was traveling had identified Weeks as the shooter of Trooper Cavazos, Rowland placed Weeks under arrest. Weeks was then taken before a magistrate and then to the Adult Classification Center in Manassas. Later that morning, in response to routine questions about his physical and mental state from classification officers in the jail, Weeks indicated that he was considering suicide because he had shot the trooper. At approximately 6:00 p.m., Weeks was brought to the lounge of the local prosecutor's office where Rowland again interviewed him. Rowland asked Weeks whether he remembered the rights Rowland had read to him earlier in the day and Weeks answered affirmatively. Rowland proceeded to summarize the evidence against Weeks. At the end of his summary, Rowland told Weeks, "This is your opportunity to provide your explanation as to what happened at the shooting scene." *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 385 (1994). Weeks replied that he was "packing" a firearm and then confessed to Trooper Cavazos's murder.

In *Mosley*, the Supreme Court addressed an issue left open by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)—the circumstances, if any, under which resumption of questioning is permissible after a person in custody has indicated that he wishes to remain silent. *See Mosley*, 423 U.S. at 100–02. Rejecting an interpretation of *Miranda* that would "create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent," *id.* at 102–03, the Supreme Court concluded "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored,'" *id.* at 104. The Supreme Court set forth the following list of factors for a court to consider in making this inquiry: (1) whether the police had given the suspect *Miranda* warnings at the first interrogation and the suspect acknowledged that he understood the warnings; (2) whether the police immediately ceased the interrogation when the suspect indicated that he did not want to answer questions; (3) whether the police resumed questioning the suspect only after the passage of a significant period of time; (4) whether the police provided a fresh set of *Miranda* warnings before the second interrogation; and (5) whether the second interrogation was restricted to a crime that had not been a subject of the earlier interrogation. *See id.* at 104–07.

[21] Weeks argues that his second interrogation was in violation of *Mosley* because his interrogators violated three of the *Mosley* factors: a significant amount of time had not passed between interrogations, no new *Miranda* warnings were given, and the second interrogation concerned the same crime that was the subject of the

first interrogation. Insofar as Weeks suggests that the failure to satisfy certain factors is dispositive of whether a *Mosley* violation has occurred, we disagree. *Mosley* does not prescribe a bright-line test to determine whether a suspect's right to cut off questioning was "scrupulously honored." Instead, the touchstone is whether a "review of the circumstances" leading up to the suspect's confession reveals that his "right to cut off questioning was fully respected." *Mosley*, 423 U.S. at 104; *see also United States v. Schwensow*, 151 F.3d 650, 659 (7th Cir.1998); *United States v. Alvarado-Saldivar*, 62 F.3d 697, 699 (5th Cir.1995).

Applying the *Mosley* factors to Weeks's case, we cannot conclude that the Supreme Court of Virginia's decision to uphold the trial court's admission of Weeks's confession was contrary to or an unreasonable application of *Mosley*. The first factor in the *Mosley* analysis is whether the suspect was advised before the initial interrogation that he had the right to remain silent. The second factor is whether there was an immediate stoppage of questioning once the suspect asserted his right to remain silent. In this case, it is undisputed that Weeks received full *Miranda* warnings during his first interrogation by Agent Rowland and that questioning ceased immediately once Weeks invoked his right to cut off questioning.

[22] The third factor in the *Mosley* analysis is whether the police waited a significant period of time after the suspect's initial invocation of his right to remain silent before questioning the suspect again. A significant period of time between interrogations does not require a durational minimum. *Compare United States v. Cody*, 114 F.3d 772, 775–76 (8th Cir.1997) (holding that three hours was significant amount of time) *with United States v. Barone*, 968 F.2d 1378, 1385 (1st Cir.1992) (holding that more than twenty-four hours was insufficient where police repeatedly pressured suspect to cooperate). Instead, a "significant period of time" is a function of to what degree the police "persist[ed] in repeated efforts to wear down [the suspect's] resistance and make him change his mind." *Mosley*, 423 U.S. at 105–06. In this case, over ten hours passed between the time when Weeks invoked his right to cut off questioning and the second interrogation, during which time Weeks was asked routine questions about his physical and mental state but was not subjected to repeated efforts to wear down his resistance. It was reasonable for the Supreme Court of Virginia to conclude that this period of time was sufficient. *See Mosley*, 423 U.S. at 104–06 (considering two hours to be a "significant period of time").

The fourth factor in the *Mosley* analysis is whether the suspect received a fresh set of *Miranda* warnings prior to the second interrogation. In this case, Agent Rowland admittedly did not reinform Weeks of his right to remain silent prior to the second interrogation. Agent Rowland did, however, ask Weeks whether he remembered the rights he had been read from the first interrogation, and Weeks responded that he did. Weeks then proceeded to confess voluntarily to the trooper's murder. The fact that incomplete *Miranda* warnings, or no warnings at all, are given prior to the second interrogation is not decisive. *See, e.g., United States v. Andrade*, 135 F.3d 104, 106–07 (1st Cir. 1998) (finding no *Mosley* violation where officer asked suspect whether he remembered rights that were read to him earlier and suspect answered in affirmative); *Kelly v. Lynaugh*, 862 F.2d 1126, 1131 (5th Cir.1988) (finding that failure to give new *Miranda* warnings did not establish *Mosley* violation because in light of two oral warnings and one written warning given earlier, it would be difficult to conclude that suspect had forgotten his *Miranda* rights); *Stumes v. Solem*, 752 F.2d 317, 319–22 (8th Cir.1985) (finding that failure to give new *Miranda* warnings did not establish *Mosley* violation because suspect's conduct indicated that he was aware

of his *Miranda* rights). This principle is particularly apt here, as Weeks apparently was aware of his *Miranda* rights and voluntarily chose not to exercise them. *See Andrade*, 135 F.3d at 106-07; *Stumes*, 752 F.2d at 321. The fact that Weeks spoke to an officer to whom he had previously asserted his right to cut off questioning further indicates that he was comfortable in exercising this right and that his decision not to exercise this right was the product of volition rather than of coercion.

[23] The fifth factor in the *Mosley* analysis is whether the second interrogation concerned a crime that was the subject of the first interrogation. In this case, both interrogations concerned the same crime—the murder of Trooper Cavazos. Where other factors indicate that a defendant's right to cut off questioning was "scrupulously honored," however, the mere fact that a second interrogation involves the same crime as the first interrogation does not necessarily render a confession derived from the second interrogation unconstitutionally invalid under *Mosley*. *See, e.g., Schwensow*, 151 F.3d at 659 ("[T]he constitutionality of a subsequent police interview depends not on its subject matter but rather on whether the police, in conducting the interview, sought to undermine the suspect's resolve to remain silent."); *Hatley v. Lockhart*, 990 F.2d 1070, 1074 (8th Cir.1993) ("[A] second interrogation is not rendered unconstitutional simply because it involves the same subject matter discussed during the first interview."); *United States v. Hsu*, 852 F.2d 407, 410 (9th Cir.1988) (noting that under flexible *Mosley* approach, "an identity of subject matter in the first and second interrogations is not sufficient, in and of itself, to render the second interrogation unconstitutional").

In sum, under the totality of the circumstances, it was reasonable for the Supreme Court of Virginia to conclude that the police "scrupulously honored" Weeks's right to cut off questioning. The record before us clearly demonstrates that the Supreme Court of Virginia's decision upholding the trial court's admission of Weeks's confession derived from the second interrogation was neither contrary to *Mosley* nor an application or interpretation of *Mosley* "that reasonable jurists would all agree [wa]s unreasonable." *Green v. French*, 143 F.3d 865, 870 (4th Cir.1998).[10]

VI.

[24-26] Next, Weeks argues that the district court erred in holding that several of his claims were procedurally defaulted. Under the well-established doctrine of procedural default, a federal habeas court may not review a claim that a state court has found to be clearly and expressly defaulted under an independent and adequate state procedural rule unless the prisoner can demonstrate cause for the default and prejudice resulting therefrom or demonstrate that a failure to consider the claims will result in a fundamental miscarriage of justice.[11] *See Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115

10. Even if we were to apply the pre-AEDPA standard of de novo review, *see Howard v. Moore*, 131 F.3d 399, 406 (4th Cir.1997) (en banc), *cert. denied*, — U.S. —, 119 S.Ct. 108, 142 L.Ed.2d 86 (1998), we would conclude, for the reasons discussed, that Weeks has failed to show that the police did not "scrupulously honor" his right to cut off questioning under *Mosley*.

11. Under the "miscarriage of justice" doctrine, a writ may be granted even without a showing of cause if a constitutional violation has probably resulted in the conviction of someone who is actually innocent. *See Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397(1986). In a capital case, to show "actual innocence" of the death penalty, a petitioner must show by clear and convincing evidence that but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty. *See Sawyer v. Whitley*, 505 U.S. 333, 348, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Before this Court, Weeks has not argued that our refusal to address his procedurally defaulted claims would result in a "miscarriage of justice." Accordingly, we do not address the "miscarriage of justice" exception.

L.Ed.2d 640 (1991); *Harris v. Reed*, 489 U.S. 255, 262, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). A state rule is adequate if it is "firmly established," *James v. Kentucky*, 466 U.S. 341, 348, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984), and regularly and consistently applied by the state court, *see Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), and is independent if it does not "depend[ ] on a federal constitutional ruling," *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

A.

[27] First, Weeks asserts that the district court erred when it determined that Claims IV and XXIV were procedurally defaulted. On direct appeal, the Supreme Court of Virginia ruled that it would not address Weeks's assignment of errors 10 and 36 because Weeks failed to register these objections at trial as required by Rule 5:25 of the Rules of the Supreme Court of Virginia.[12] *Weeks v. Commonwealth*, 450 S.E.2d 379, 388, 389 (Va.1994). Weeks subsequently raised these objections in his federal habeas petition as Claims IV and XXIV. The district court found these claims to be procedurally defaulted under Rule 5:25. *Weeks v. Angelone*, 4 F.Supp.2d 497, 515 (E.D.Va.1998).

Weeks does not dispute that these claims are procedurally defaulted under Rule 5:25, but he now argues that Rule 5:25 is not an adequate state procedural bar because it is not regularly and consistently applied by the Virginia state courts. As support for this contention, Weeks cites several Virginia state cases that allegedly demonstrate that Virginia courts have often strayed from the contemporaneous objection rule.

We find this argument to be without merit. As a general matter, an unambiguous court rule such as Rule 5:25 is necessarily "firmly established." *See O'Dell v. Netherland*, 95 F.3d 1214, 1241 (4th Cir. 1996) (en banc). Moreover, contrary to Weeks's assertion on appeal, the Supreme Court of Virginia has regularly and consistently applied Rule 5:25 in recent years. *See, e.g., Fairfax Hosp. v. Curtis*, 492 S.E.2d 642, 648 (Va.1997); *Angstadt v. Atlantic Mut. Ins. Co.*, 492 S.E.2d 118, 121 (Va.1997); *Hughes v. Cole*, 251 Va. 3, 465 S.E.2d 820, 831 (Va.1996); *see also Bennett v. Angelone*, 92 F.3d 1336, 1345 n. 7 (4th Cir.1996) ("Normally, the Virginia Supreme Court will not review errors not preserved by contemporaneous objection."). The mere recitation of a few cases in which the Supreme Court of Virginia has not applied Rule 5:25 is insufficient to show that Rule 5:25 is not consistently or regularly applied because "[c]onsistent or regular application of a state rule of procedural default does not require that the state court show an undeviating adherence to such rule admitting of *no* exception, when the state procedural rule has, as a general rule, ... been applied in the vast majority of cases." *Yeatts v. Angelone*, 166 F.3d 255, 263-64 (4th Cir.1999) (internal quotation marks and citations omitted); *accord Smith v. Dixon*, 14 F.3d 956, 972 (4th Cir.1994). Weeks therefore fails to establish that Rule 5:25 is not an independent and adequate state procedural bar precluding review of errors he did not raise at trial.

B.

Next, Weeks claims that the district court erred when it determined that Claims II, III, VI, VIII, XVII, XXI, and XXIII were procedurally defaulted. On direct appeal, Weeks filed a ninety-page brief that raised forty-seven errors. He moved for leave to file an oversized brief pursuant to Rule 5:26. The Supreme Court of Virginia denied Weeks's motion

12. Rule 5:25 provides: "Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Va. Sup.Ct. R. 5:25 (Michie 1998).

and ordered him to file a fifty-page brief.[13] Due to the space limitation, Weeks deleted the arguments supporting ten claims of federal constitutional error. The Supreme Court of Virginia refused to consider these ten claims (nos. 4, 5, 6, 7, 8, 17, 26, 31, 38, and 39) for failure to brief or argue the errors. *Weeks*, 450 S.E.2d at 383 (citing *Jenkins v. Commonwealth*, 244 Va. 445, 423 S.E.2d 360, 364 (1992)). Weeks subsequently raised seven of these claims in his federal habeas petition as Claims II, III, VI, VIII, XVII, XXI, and XXIII. The district court found these claims to be procedurally defaulted for failure to brief them on direct appeal. *Weeks*, 4 F.Supp.2d at 515–17.

Weeks now argues that the state rule preventing consideration of claims not briefed on direct appeal does not constitute an adequate and independent state bar because the fifty-page limitation physically prevented him from presenting these claims. In the alternative, Weeks argues that even if the rule is an adequate and independent state procedural bar, he has shown cause and prejudice to overcome the bar because the Supreme Court of Virginia's refusal to deviate from its fifty-page limit even when it was on notice that Weeks needed more than fifty pages to present his arguments was an "objective factor external to the defense" that impeded Weeks's ability to comply with the state procedural rule. Weeks also argues that by proffering the defaulted claims in his original oversized brief, he satisfied the exhaustion requirement for the purposes of federal proceedings and that further presentation of these claims was not required because the fifty-page limitation rendered the state appellate process ineffective to protect his rights. We address these arguments in turn.

1.

[28] First, Weeks argues that the state procedural bar preventing consideration of claims not briefed on direct appeal was not adequate and independent because the fifty-page brief limit physically prevented him from presenting all forty-seven assigned errors to the Supreme Court of Virginia. In support of this argument, Weeks cites *Reese v. Peters*, 926 F.2d 668 (7th Cir.1991). In *Reese*, state law prevented the petitioner from raising several claims in post-conviction proceedings in state court. *See id.* at 670. On federal habeas review, the district court deemed these claims to be forfeited. *See id.* The Seventh Circuit stated that "[w]hen state law does not allow the prisoner to present a particular claim, the omission—submitting to limitations established by law—is not an independent and adequate state ground precluding federal review." *Id.* The Seventh Circuit concluded, however, that because the petitioner did not present the claims on direct appeal from his conviction, he forfeited the claims on collateral review. *See id.* at 671.

Reese cuts against Weeks's argument rather than supporting it. Much like the petitioner in *Reese*, Weeks voluntarily withdrew the arguments supporting several claims on direct appeal. The fifty-page limit merely limited the manner in which Weeks could present his arguments; it did not wholly prevent him from presenting them. Moreover, the Supreme Court of Virginia has regularly and consistently refused to consider claims not briefed or argued on direct appeal. *See, e.g., Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380, 385 (1992); *Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218, 222 (1991); *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385, 390 (1990). The state procedural rule that deems arguments not briefed to be waived is therefore an adequate and independent state bar.

2.

[29, 30] Second, Weeks argues that even if the state procedural bar was adequate and independent, cause and prejudice existed for his default. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's effort to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Weeks argues that the fifty-page limit imposed by the Supreme Court of Virginia was itself an "objective factor external to the defense" that impeded his effort to comply with the state procedural rule.

We find this argument unpersuasive. While the page limitation may have led Weeks's counsel to make certain strategic choices as to which arguments to include and which to omit, the page limitation is reasonable.[14] It would be nonsensical to hold that the fifty-page limit, which is itself a reasonable and consistently applied state procedural rule, could constitute cause for failure to adhere to another state procedural rule that deems issues not briefed on direct appeal to be waived. The fifty-page limit therefore did not constitute cause for Weeks's failure to comply with the state procedural rule requiring litigants to brief issues on appeal in order to preserve them.

3.

[31, 32] Finally, Weeks argues that by presenting the defaulted claims in his original oversized brief, he satisfied the exhaustion requirement for purposes of federal proceedings. Weeks also argues that further presentation of these claims was not required because circumstances existed that rendered the state appellate process ineffective to protect his rights. *See* 28 U.S.C.A. § 2254(b)(1)(B)(ii) (West Supp. 1998). It appears that Weeks is conflating the related concepts of exhaustion and procedural default.[15] Both parties, the district court, and we agree that Weeks's claims have been exhausted. The issue, however, is whether these claims are defaulted by Weeks's failure to brief them on direct appeal, and, if so, whether there is cause for and prejudice resulting from Weeks's default. As we concluded above, the state rule preventing consideration of claims not briefed on direct appeal is an adequate and independent state bar, and the fifty-page limit does not constitute cause for defaulted claims not presented on appeal. Weeks therefore fails to show that the state procedural rule barring review of claims not briefed on appeal is not an adequate and independent state bar precluding review of the claims he chose not to present to the Supreme Court of Virginia in his fifty-page brief.

C.

[33] Finally, Weeks claims that the district court erred when it determined that his ineffective-assistance-of-trial-counsel claims were procedurally defaulted. As of July 1, 1995, prisoners under a sentence of death were required to comply with a statute of limitations for filing habeas petition and were limited to filing an original petition in the Supreme Court of Virginia. *See* Va.Code Ann. § 8.01-654.1 (Michie Supp.1998); Va. Sup.Ct. R.

13. Rule 5:26(a) provides: "Except by permission of a justice of this Court, neither the opening brief of appellant, nor the brief of appellee, nor a brief amicus curiae shall exceed 50 typed or 36 printed pages." Va.Sup. Ct. R. 5:26(a) (Michie 1998).

14. The United States Supreme Court limits opening briefs to 50 pages. *See* U.S. S.Ct. R. 33.1(g).

15. "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997). "A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture." *George v. Angelone*, 100 F.3d 353, 363 (4th Cir.1996). Thus, the exhaustion requirement is also satisfied when a state procedural rule would bar consideration of the unexhausted claim if the claim was presented to the state court. *See Matthews*, 105 F.3d at 911 (citing *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). A claim is procedurally defaulted when it is rejected by a state court on an adequate and independent state procedural ground. *See Coleman*, 501 U.S. at 750

5:7A(a) (Michie 1998).[16] (J.A. at 517–20). Weeks's state habeas counsel erroneously filed Weeks's habeas petition in the Circuit Court for Prince William County. On December 1, 1995, the date on which Weeks's state habeas petition was due in the Supreme Court of Virginia, habeas counsel withdrew the petition and mailed it to the Supreme Court of Virginia by regular mail. The Supreme Court of Virginia received the petition on December 4, 1995.[17] On March 15, 1996, the Supreme Court of Virginia granted the Commonwealth's motion to dismiss Weeks's petition as untimely, and, therefore, jurisdictionally barred. The district court found Weeks's ineffective-assistance-of-trial-counsel claims to be procedurally defaulted due to the untimely filing of his state habeas petition. *Weeks*, 4 F.Supp.2d at 510–11.

In Virginia, claims of ineffective assistance of trial counsel generally must be presented on collateral review rather than direct appeal. *See Roach v. Commonwealth*, 251 Va. 324, 468 S.E.2d 98, 105 n. 4 (1996). Weeks does not dispute that the untimely filing of his state habeas petition constitutes an independent and adequate state bar to the consideration of his ineffective-assistance-of-trial-counsel claims on federal habeas, but he now argues that cause and prejudice exist to excuse his defaults. Specifically, Weeks alleges that the defaults resulted from the clear conflict of interest under which his court-appointed state habeas attorney labored: the attorney had previously represented at trial another capital defendant, who was subsequently represented on state habeas by Weeks's former trial attorney. As support for his contention that such a conflict constitutes "cause," Weeks cites Legal Ethics Opinion (LEO) No. 1665, issued on April 1, 1996, by the Virginia State Bar, which condemned such "cross appointments" because each counsel "was expected to zealously advocate petitioner's claims of ineffective assistance of counsel ... while simultaneously defending himself against substantially similar claims."

[34] Ineffective assistance of counsel may constitute "cause" for a procedural default under certain circumstances. *Murray*, 477 U.S. at 488. For an attorney error to constitute cause, however, a petitioner must first possess a constitutional right to assistance of counsel. *See Coleman*, 501 U.S. at 752. This Court has recently held that a petitioner has no constitutional right to assistance of counsel in state habeas proceedings, even though claims of ineffective assistance of trial counsel can only be raised on state collateral review. *See Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir.1997) (en banc), *cert. denied*, — U.S. —, 118 S.Ct. 907, 139 L.Ed.2d 922 (1998). In an attempt to avoid the binding precedent of *Mackall*, Weeks argues that he possesses a liberty interest in conflict-free habeas representation that is protected under the due process clause of the Fourteenth Amendment based on his statutory right to counsel under Va.Code Ann. § 19.2–163.7 (Michie 1995).[18] Weeks further contends that the actions of his conflicted state habeas counsel in failing to observe the jurisdictional rules in filing his state habeas petition and in failing to withdraw after the Virginia State Bar issued LEO No. 1665, and of the state courts in appointing conflicted counsel, constituted violations of his due process rights.

[35] Although Weeks characterizes the conduct of his state habeas counsel as "outrageous," at the district court level he relied on the same set of facts in making his Sixth Amendment claim of ineffective assistance of habeas counsel as his Fourteenth Amendment due process claim. We thus view his argument as an attempt to shoehorn a claim of ineffective assistance of counsel into a due process claim. We agree with the Ninth Circuit's reasoning in *Bonin v. Calderon*, 77 F.3d 1155 (9th Cir.1996), which denied a due process claim nearly identical to Weeks's:

> [The petitioner] essentially argues that the Fourteenth Amendment violation *is* his ineffective assistance of counsel.... [W]e now hold that ineffective assistance of counsel in habeas corpus proceedings does not present an independent violation of the Sixth Amendment enforceable against the states through the Due Process Clause of the Fourteenth Amendment. To recognize such a claim would allow the Fourteenth Amendment to "swallow the rule" that there is no constitutional right to effective assistance of counsel in habeas corpus proceedings.

Id. at 1160; *see also Smith v. Angelone*, 111 F.3d 1126, 1133 n. 4 (4th Cir.1997) ("We have never held that a prisoner may claim a due process violation based upon his lawyer's performance on state habeas ...."), *cert. denied*, 521 U.S. 1131, 118 S.Ct. 2, 138 L.Ed.2d 1036 (1997). Under the persuasive reasoning of *Bonin*, a petitioner may claim a due process violation occurring in his state habeas proceeding, but he may not premise this claim solely on the alleged ineffective assistance of state habeas counsel. Because Weeks's due process claim is the same as his claim of ineffective assistance of habeas counsel and this Court does not recognize a constitutional right to counsel on state habeas, the alleged ineffective assistance of habeas counsel cannot constitute cause to excuse Weeks's defaulted ineffective-assistance-of-trial-counsel claims.

VII.

In conclusion, for the reasons discussed above, we hold that Weeks has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C.A. § 2253(c)(2) (West Supp.1998). We therefore deny his application for a certificate of appealability and dismiss his petition.

DISMISSED.

16. Section 8.01–654.1 provides: "No petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after ... denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal." Va.Code. Ann. § 8.01–654.1 (Michie Supp.1998). Rule 5:7A(a) provides: "A petition for a writ of habeas corpus shall be filed in the office of the clerk of this Court within 60 days after ... the denial by the Supreme Court of the United States of a petition for a writ of certiorari to the judgment of this Court on direct appeal." Va. Sup.Ct. R. 5:7A(a) (Michie 1998).

17. Had Weeks's state habeas petition been mailed by registered or certified mail, rather than by ordinary mail, it would have been deemed timely. *See* Va. Sup.Ct. R. 5:5(b) (Michie 1998).

18. Section 19.2–163.7 of the Virginia Code provides that following the affirmance of a death sentence on appeal to the Supreme Court of Virginia, the circuit court shall appoint counsel to represent an indigent prisoner in a state habeas proceeding. *See* Va.Code Ann. § 19.2–163.7 (Michie 1995).

KEY NUMBER SYSTEM

In re Abdulaziz Salem TAMIMI, Debtor-in-possession.

Saudi Arabian Airlines Corporation, Garnishee–Appellant,

v.

Sharon L. Tamimi, Creditor–Appellee.

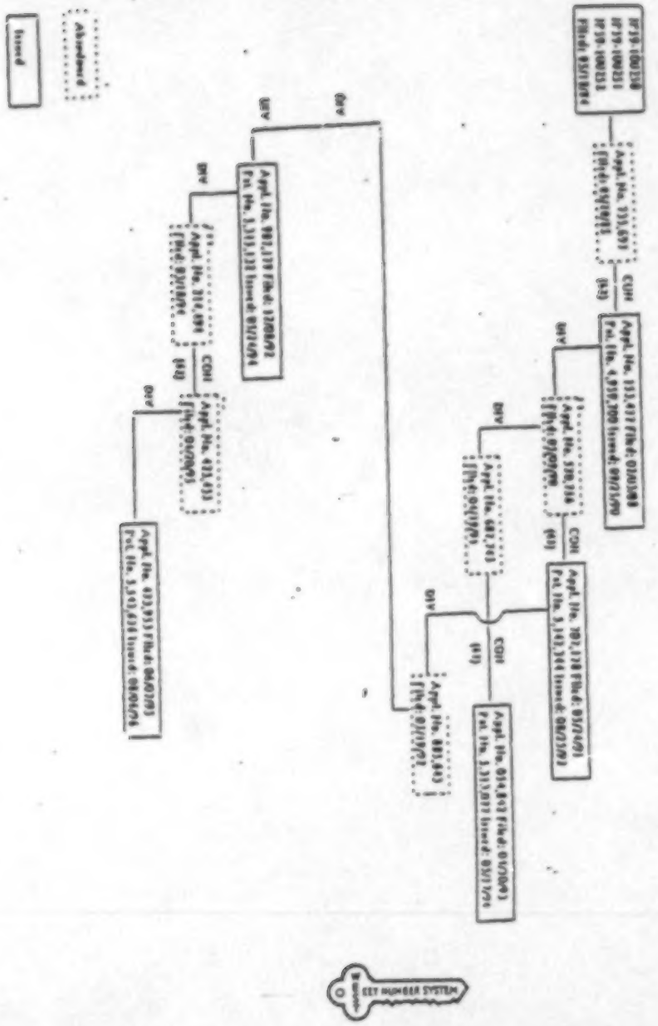
No. 98–1423.

United States Court of Appeals, Fourth Circuit.

Argued Jan. 27, 1999.

Decided May 21, 1999.

Employee's ex-wife brought garnishment action in state court against employer, the Saudi Arabian Airlines Corporation, seeking to recover child support arrearages. Employer, as garnishee, removed ac-



USP 5,543,636

Lonnie WEEKS, Jr., Petitioner,

v.

Ronald J. ANGELONE, Director of the Virginia Department of Corrections, Respondent.

Action No. 2:96CV829.

United States District Court, E.D. Virginia, Norfolk Division.

April 1, 1998.

Order Denying Motion to Amend Judgment, June 19, 1998.

Defendant petitioned for federal habeas relief after his conviction of capital murder of state trooper was affirmed on appeal, 248 Va. 460, 450 S.E.2d 379. The District Court, Rebecca Beach Smith, J., held that: (1) Virginia did not meet the "opt-in" requirements for its proceedings to be accorded special deference by federal habeas court under the Antiterrorism and Effective Death Penalty Act (AEDPA); (2) section of the AEDPA, limiting evidentiary hearings in federal habeas proceedings, did not eliminate "actual innocence of the death penalty" doctrine as gateway for petitioner to have his defaulted claims reviewed by habeas court; (3) petitioner failed to establish "cause and prejudice" or "miscarriage of justice," of kind that would permit federal habeas review of his procedurally defaulted claims; (4) petitioner was not entitled to appointment of forensic and ballistic experts who assist him in presenting habeas corpus claim; (5) petitioner had no constitutional right to bill of particulars; and (6) state trial judge's penalty phase instructions were not contrary to, or an unreasonable application of, federal law.

Petition denied and dismissed.

Motion to alter or amend denied.

1. Habeas Corpus ⇐332.1

Virginia's failure to provide comprehensive mechanism for appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings prevented it from qualifying as "opt-in" state, whose proceedings would be entitled to greater deference on federal habeas review under the Antiterrorism and Effective Death Penalty Act (AEDPA). Antiterrorism and Effective Death Penalty Act of 1996, § 107, 110 Stat. 1214.

2. Habeas Corpus ⇐332.1

State must strictly, rather than just substantially, comply with eligibility requirement imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA), that it provide mechanism for appointment and compensation of competent counsel in state post-conviction proceedings, in order to qualify as "opt-in" state whose proceedings will be entitled to greater deference on federal habeas review. Antiterrorism and Effective Death Penalty Act of 1996, § 107, 110 Stat. 1214.

3. Habeas Corpus ⇐401

Section of the Antiterrorism and Effective Death Penalty Act (AEDPA), limiting federal habeas courts ability to hold evidentiary hearing to allow petitioner to develop factual basis of claim, did not eliminate the "actual innocence of the death penalty" doctrine as gateway for petitioner, in "non-opt-in" state, to have his procedurally defaulted claim reviewed. 28 U.S.C.A. § 2254(e)(2).

4. Habeas Corpus ⇐377

Section of the Antiterrorism and Effective Death Penalty Act (AEDPA), limiting federal habeas courts ability to hold evidentiary hearing to permit petitioner to develop factual basis of claim, applied only where the flawed fact-finding in state court was somehow attributable to petitioner; statute did not apply where petitioner had attempted, but been denied opportunity, to develop facts by state courts. 28 U.S.C.A. § 2254(e)(2).

5. Habeas Corpus ⇐401, 404

Generally, procedurally defaulted claims are not reviewable on petition for federal habeas relief, unless petitioner can show either cause and prejudice for his default, or that a failure to hear claims would constitute miscarriage of justice.

6. Habeas Corpus ⇐401

To meet the "miscarriage of justice" exception to proscription against review of procedurally defaulted claims, habeas petitioner must show that constitutional violation has probably resulted in the conviction of one who is actually innocent.

7. Habeas Corpus ⇐401, 431

Habeas petitioners who have been sentenced to death may invoke the "miscarriage of justice" exception to proscription against review of procedurally defaulted claims, even if they are not able to show that constitutional violation has probably resulted in conviction of one who is actually innocent, by demonstrating through clear and convincing evidence that, but for constitutional error, no

reasonable juror would have found petitioner eligible for death penalty.

8. Habeas Corpus ⇐422

Dismissal for untimeliness of state habeas petition was adequate and independent state bar to federal habeas review of petitioner's claims, where newly enacted statute of limitations pursuant to which state petition was dismissed clearly and unambiguously required dismissal unless petition was filed within 60 days after denial of petition for writ of certiorari. Va.Code 1950, § 8.01–654.1.

9. Habeas Corpus ⇐403

State procedural rule pursuant to which federal habeas petitioner's claims were dismissed in state court is not sufficient to preclude federal habeas review on merits, unless state rule was both firmly established and regularly applied.

10. Habeas Corpus ⇐422

As general matter, procedural rules derived from unambiguous state statutes and Supreme Court rules are necessarily "firmly established." for purpose of deciding whether dismissal pursuant to state rule will constitute an adequate and independent state bar to federal habeas review.

See publication Words and Phrases for other judicial constructions and definitions.

11. Criminal Law ⇐641.13(7)

Habeas Corpus ⇐406

Habeas petitioner did not have constitutional right to effective assistance of counsel at state post-conviction proceedings, not even for purpose of presenting claims that, as matter of law, could not have been raised on direct appeal; accordingly, alleged ineffective assistance of state post-conviction counsel did not constitute "cause" for petitioner's procedural default in state court, and did not permit review of petitioner's procedurally defaulted claims under the "cause and prejudice" exception to procedural default rule. U.S.C.A. Const.Amend. 6.

12. Habeas Corpus ⇐406

Attorney error will constitute "cause" for habeas petitioner's procedural default only if, at time of error, petitioner had constitutional right to assistance of counsel. U.S.C.A. Const.Amend. 6.

13. Habeas Corpus ⇐401

Habeas petitioner was not entitled to have his procedurally defaulted ineffective assistance of counsel claims reviewed under the "miscarriage of justice" exception to procedural default rule, on theory that, but for counsel's error, no reasonable juror would have found petitioner eligible for death penalty, where petitioner never explained how counsel's alleged ineffective assistance affected jury's finding as to presence of aggravating factor on which it relied in sentencing him to death. U.S.C.A. Const.Amend. 6.

14. Habeas Corpus ⇐401

To have procedurally defaulted constitutional claim reviewed by federal habeas court under the "miscarriage of justice" exception to procedural default rule, petitioners are required to link their new evidence to the defaulted claim, by showing that it is the claimed error which prevented fact finder from adequately considering evidence at trial.

15. Habeas Corpus ⇐401

"Actual innocence" exception to procedural default rule is grounded on equitable discretion of habeas courts to see that federal constitutional errors do not result in incarceration of innocent persons.

16. Habeas Corpus ⇐442, 452

Habeas court does not sit to correct errors of fact, but to ensure that individuals are not imprisoned in violation of Constitution.

17. Habeas Corpus ⇐422

Dismissal of federal habeas petitioner's claims by Virginia Supreme Court on direct appeal, pursuant to Virginia's contemporaneous objection rule, constituted an adequate and independent state ground upon which federal review could be precluded.

18. Habeas Corpus ⇐403

Dismissal of federal habeas petitioner's claims by Virginia Supreme Court on direct appeal based on his failure to brief or argue alleged errors provided adequate and independent state ground to bar federal review, where petitioner offered no argument that briefing rule was not regularly or consistently applied.

19. Habeas Corpus ⇐405.1

Fifty-page limit on briefs filed in the Virginia Supreme Court did not constitute "cause" for federal habeas petitioner's state procedural default in failing to brief or argue certain errors, and did not permit review of errors by federal habeas court under the "cause and prejudice" exception to procedural default rule; actual "cause" of appellate counsel's failure to properly brief particular claims on direct appeal was not this 50-page limit, but strategic choice made by counsel to focus on particular claims.

20. Habeas Corpus ⇐422

Dismissal of federal habeas petitioner's claims on direct appeal by Virginia Supreme Court, on theory that claim impermissibly incorporated by reference a memorandum filed on subject in state trial court, constituted an adequate and independent ground for barring federal habeas review.

21. Habeas Corpus ⇐405.1

Fifty-page limit on briefs filed with the Virginia Supreme Court did not constitute "cause" for habeas petitioner's procedural default in impermissibly attempting to incorporate memorandum by reference, and did not permit review of procedurally defaulted claims under the "cause and prejudice" exception to procedural default rule.

22. Habeas Corpus ⇐313.1

Claims which federal habeas petitioner never raised in state court were procedurally barred, and could not be considered on federal habeas review.

23. Federal Civil Procedure ⇐2544

Party seeking summary judgment has initial responsibility of informing court of basis for his motion, and of identifying those portions of record which he believes demonstrate the absence of genuine issue of material fact; it is only when movant satisfies this preliminary burden that opposing party must come forward and make showing sufficient to establish existence of element essential to that party's case, and on which it will bear burden of proof at trial. Fed.Rules Civ.Proc. Rule 56, 28 U.S.C.A.

24. Criminal Law ⇐1158(1)

Decision whether to appoint experts is pretrial matter, reviewable for clear error. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(9), 21 U.S.C.A. § 848(q)(9).

25. Costs ⇐302.2(2)

Expert assistance is not "reasonably necessary," within meaning of statute governing appointment of experts in criminal cases, where no evidentiary hearing will be held at which expert's testimony could be presented. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(9), 21 U.S.C.A. § 848(q)(9).

See publication Words and Phrases for other judicial constructions and definitions.

26. Costs ⇐302.2(2), 302.4

Federal habeas petitioner was not entitled to appointment of forensic pathologist and ballistics expert to assist him in arguing that state trial judge had improperly denied him the services of forensic and ballistics expert, where state trial judge's decision was not contrary to any clearly established federal law and would not, in any event, have provided basis for federal habeas relief. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(9), 21 U.S.C.A. § 848(q)(9).

27. Habeas Corpus ⇐461

To obtain federal habeas relief on theory that state trial judge violated his due process rights by denying him the services of forensic and ballistics expert, petitioner had to show that state trial judge's decision was contrary to clearly established federal law, and that trial judge's error had substantial and injurious effect or influence in determining jury's verdict. 28 U.S.C.A. § 2254(d).

28. Habeas Corpus ⇐461

State trial judge's denial of indigent capital defendant's request for appointment of forensic and ballistics expert was not contrary to any clearly established federal law,

and did not provide basis for federal habeas relief, where any determination by federal habeas court that defendant was constitutionally entitled to assistance of forensic and ballistics expert would amount to a "new rule" of law. 28 U.S.C.A. § 2254(d).

29. Habeas Corpus ⇐450.1, 452

Summary dismissal by state court of claim reasserted by defendant in his petition for federal habeas relief is an "adjudication on the merits," within meaning of federal statute establishing the standard of review to be applied by federal habeas court in considering claims previously adjudicated on the merit in state court proceedings. 28 U.S.C.A. § 2254(d).

See publication Words and Phrases for other judicial constructions and definitions.

30. Habeas Corpus ⇐452

Federal statute precluding a grant of habeas relief upon any claim adjudicated on the merits in state court, unless state court's decision "was contrary to, or involved in unreasonable application of, clearly established federal law," abrogated the de novo standard of review previously applicable in federal habeas court to claims of legal error, by changing federal court's focus from petitioner's freestanding legal claims themselves to the state court decision addressing those claims. 28 U.S.C.A. § 2254(d).

31. Constitutional Law ⇐55

Habeas Corpus ⇐205

Federal statute precluding a grant of habeas relief with respect to any claim previously adjudicated on merits in state court, unless state court's decision was "contrary to, or involved in unreasonable application of, clearly established federal law," did not unconstitutionally eliminate judicial power of federal judiciary to say what the law was; while statute increased the respect due state decisions, federal habeas courts still had to independently determine whether state court decision was correct under federal law. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 2254(d).

32. Habeas Corpus ⇐452

In determining, as required under review provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), whether state court's previous ruling on claim constitutes an unreasonable application of federal law, federal habeas courts may not rely on their own jurisprudence, but must compare state trial judge's decision to clearly established federal law as determined by the United States Supreme Court; petitioner must be able to point to authoritative decision of the Supreme Court in order to secure writ. 28 U.S.C.A. § 2254(d)(1).

33. Habeas Corpus ⇐452

Even if habeas petitioner shows that state court incorrectly found a claim to be meritless, in that state court's decision was contrary to clearly established federal law, petitioner must still demonstrate, as prerequisite to federal habeas relief, that this proven trial error was not harmless, in that it had substantial and injurious effect or influence in determining jury's verdict. 28 U.S.C.A. § 2254(d).

34. Habeas Corpus ⇐461

Ex parte hearing to which federal defendant is entitled on application for expert assistance is mandated as a matter of federal statutory and not of constitutional law; accordingly, state trial judge's denial of such a hearing to habeas petitioner did not provide basis for federal habeas relief, as not contrary to, or an unreasonable application of, federal constitutional law. 28 U.S.C.A. § 2254(d).

35. Constitutional Law ⇐265

Habeas Corpus ⇐474

Indictment and Information ⇐121.1(2)

Federal habeas petitioner had no liberty interest in receiving a bill of particulars in connection with prosecution of murder charge against him in state court, of kind which might support procedural due process claim; accordingly, state trial judge's denial of defendant's request for bill of particulars was not contrary to, or an unreasonable application of, federal law and did not provide basis for federal habeas relief. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254(d).

36. Habeas Corpus ⇐770

State trial judge's determination that murder defendant had failed to show "cause" for excusal of member of venire whose close relative had been shot to death in course of his duty as police officer was factual finding, which was presumed correct on federal habeas review absent clear and convincing evidence to contrary. 28 U.S.C.A. § 2254(e)(1).

37. Habeas Corpus ⇐496

State trial judge's refusal to give voir dire question requested by capital murder defendant, as to whether venirepersons believe that a sentence of life imprisonment would require defendant to spend the remainder of his life in prison, was not contrary to, or an unreasonable application of, federal law, and did not entitle defendant to federal habeas relief, where trial judge had inquired whether venirepersons would be able to consider voting for sentence less than death, and whether they knew of any reason why they could not sit and render a fair and impartial verdict. 28 U.S.C.A. § 2254(d).

38. Habeas Corpus ⇐496

State trial judge's refusal to allow proposed voir dire questions regarding racial bias, in capital murder case involving black defendant and white victim, was not contrary to, or an unreasonable application of, federal law, and did not provide basis for federal habeas relief, where judge had allowed two questions as to racial bias, as to whether veniremembers would disapprove of member of their family marrying a person of different race and as to whether they believed that persons of African descent were more likely to commit crimes, and disallowed defendant's proposed questions as open-ended, argumentative and ineffectual. 28 U.S.C.A. § 2254(d).

39. Jury ⇐131(6)

Capital defendant accused of interracial crime is entitled to have prospective jurors informed of race of victim and questioned on issue of racial bias.

40. Jury ⇐131(6)

While capital defendant accused of interracial crime is entitled to have prospective jurors questioned on issue of racial bias, trial judge retains discretion as to form and number of questions on subject of race.

41. Habeas Corpus ⇐496

State trial judge's refusal to allow proposed voir dire questions as to venirepersons' possible bias in favor of death penalty was not contrary to, or an unreasonable application of, federal law, and did not provide basis for federal habeas relief, where such questions as trial judge allowed were adequate to identify those venirepersons who would automatically vote for death penalty. 28 U.S.C.A. § 2254(d).

42. Criminal Law ⇐412.1(4)

Arresting officer "interrogated" defendant, subsequent to defendant's invocation of his Fifth Amendment rights, when officer, after summarizing the evidence against defendant, and after falsely indicating that eyewitness had identified defendant as the murderer, remarked that this was defendant's opportunity to provide some explanation as to what had happened at shooting scene; officer's statement was of the sort reasonably likely to elicit an incriminating response, even though it may not have been phrased as a question. U.S.C.A. Const.Amends. 5, 6.

See publication Words and Phrases for other judicial constructions and definitions.

43. Criminal Law ⇐412.1(4)

While focus of court's inquiry, in deciding whether officer's statement is reasonably likely to elicit an incriminating response so as to constitute "interrogation" for purposes of *Miranda*, is not on officer's intent, officer's intent in making statement is not irrelevant to inquiry. U.S.C.A. Const.Amends. 5, 6.

44. Habeas Corpus ⇐490(3)

State trial judge's determination that police officer had not violated defendant's Fifth Amendment rights when, some hours after defendant had exercised his right to cut off police questioning, officer made second inquiry as to circumstances surrounding homicide was not contrary to, or an unreasonable application of, federal law, and did not provide basis for federal habeas relief, where state trial judge analyzed defendant's claim in light of applicable Supreme Court precedent and

compared circumstances of defendant's questioning to the factors found relevant by the Supreme Court in deciding whether suspect's right to cut off questioning has been scrupulously honored. U.S.C.A. Const.Amends. 5, 6; 28 U.S.C.A. § 2254(d).

45. Habeas Corpus ⇐775(2)

Petitioner was not entitled to habeas relief on theory that evidence obtained in violation of his Fourth Amendment rights had been improperly introduced at his trial, absent a showing that state had not provided him with full and fair opportunity to litigate Fourth Amendment issue. U.S.C.A. Const. Amend. 4; 28 U.S.C.A. § 2254(d).

46. Criminal Law ⇐419(2)

State witness' testimony as to threats he had received from defendant's "admirers" was not offered for its truth, but to explain why state witness felt that he needed protection, and did not constitute "hearsay."

47. Witnesses ⇐287(3)

To the extent that defendant may have been prejudiced by allowing state witness to testify on redirect as to threats he had received from defendant's admirers, defendant opened the door to such testimony by cross-examining state witness as to whether he hoped to receive protection from the state; testimony was properly admitted to explain why witness felt that he needed protection.

48. Criminal Law ⇐449.2

Police officer was not improperly allowed to testify as to defendant's lack of credibility, in violation of defendant's constitutional right to fair trial, when state trial judge, over defendant's objection, allowed officer to testify that certain information he had received from defendant's uncle had caused him to doubt defendant's truthfulness; testimony was admitted to show officer's state of mind during his investigation of homicide, and was not comment on defendant's credibility and ultimate culpability. U.S.C.A. Const.Amends. 5, 6, 8, 14.

49. Habeas Corpus ⇐505

Admission into evidence, at penalty phase of capital murder case, of criminal records of defendant's former associates, in order to establish background and environment in which defendant operated his business, was not so prejudicial as to fatally affect sentencing phase of case and to deprive defendant of his constitutional right to fair trial; accordingly, state trial judge's evidentiary ruling did not provide basis for federal habeas relief. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254(d).

50. Habeas Corpus ⇐490(1)

Admissibility of evidence is generally a matter of state law, and in absence of showing that admission of evidence violated some specific constitutional guarantee, federal court can issue writ of habeas corpus on basis of state court's evidentiary ruling only when that ruling violated defendant's right to due process by denying him a fundamentally fair trial. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254(d).

51. Habeas Corpus ⇐499

State trial judge's response, at penalty phase of capital murder case, to question that he received from deliberating jury as to whether life sentence was with possibility of parole, when judge indicated that jurors were not to concern themselves with what might happen to defendant afterwards but to impose such punishment as they felt just under the evidence, was not contrary to, or an unreasonable application of, federal law, and did not provide basis for federal habeas relief. 28 U.S.C.A. § 2254(d).

52. Habeas Corpus ⇐498

State trial judge's refusal of penalty phase instruction requested by capital murder defendant, that jurors could give effect to evidence in mitigation by sentencing defendant to life in prison even if they found one or both of the aggravators, and court's decision to instead give a pattern jury instruction that permitted jury to "fix" defendant's penalty at death if aggravating factor was found, was not contrary to, or unreasonable application of, federal law, and did not entitle defendant to federal habeas relief; while defendant's requested instruction may have been clearer, pattern jury instruction had previously been upheld by the United States Supreme Court and did not violate defendant's right to have jury adequately informed on

effect it could give to mitigating evidence. 28 U.S.C.A. § 2254(d).

53. Criminal Law ⇐796

Restrictions on jury's sentencing determination at punishment phase of capital case must not preclude jury from being able to give effect to mitigating evidence.

54. Habeas Corpus ⇐499

State trial judge's response, at penalty phase of capital case, to question posed by deliberating jury as to whether they could sentence defendant to life in prison even if they found a statutory aggravating factor, which was merely to refer jurors back to pattern jury instruction previously approved by the United States Supreme Court without specifically instructing them on their ability to give effect to mitigating evidence by sentencing defendant to life in prison, was not contrary to, or an unreasonable application of, federal law, and did not entitle defendant to federal habeas relief. 28 U.S.C.A. § 2254(d).

On Motion to Alter or Amend Judgment

55. Indictment and Information ⇐121.1(2)

Virginia statute providing that, in order to assist defendant in filing pretrial suppression or other motions, the trial court "shall," upon motion of defendant, direct the Commonwealth to file bill of particulars did not give criminal defendant an absolute right to bill of particulars on request, but required trial court to order bill of particulars only if, in its discretion, it found that such a bill was necessary to assist defense in filing suppression or other motions. Va.Code 1950, § 19.2-266.2.

56. Constitutional Law ⇐265

Habeas Corpus ⇐474

Indictment and Information ⇐121.1(2)

Even assuming that Virginia statute gave capital murder defendant an absolute right to bill of particulars upon request, state trial judge's violation of that right, in failing to order bill of particulars, was only a violation of state law, and did not rise to level of deprivation of defendant's due process rights, of kind that would provide basis for federal habeas relief. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254(d); Va.Code 1950, § 19.2-266.2.

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OPINION AND FINAL ORDER

REBECCA BEACH SMITH, District Judge.

This matter was initiated on February 7, 1997, by petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner was convicted for the capital murder of Virginia State Trooper Jose Cavazos, and was sentenced to death on January 14, 1994.[1] The petition alleges violations of federal rights pertaining to petitioner's conviction and sentencing in the Circuit Court of Prince William County, Virginia. Specifically, Weeks attacks the validity of his conviction and sentence on thirty-four (34) separate grounds.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure, and Rule 29 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. The Magistrate Judge's Report and Recommendation (R & R) was filed on July 30, 1997, recommending that the petition be denied and dismissed.

By copy of the report, each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On August 18, 1997, this court received "Petitioner's Objec-

1. The Magistrate Judge's Report and Recommendation (R & R) contains a detailed statement of facts, which this court adopts.

tions to United States Magistrate Judge's Report and Recommendation," and respondent's "Objections to Magistrate Judge's Report and Recommendation." The parties' respective responses to the objections were both filed on September 5, 1997.

Petitioner objects to each of the Magistrate Judge's recommendations to deny the individual claims presented in the Petition for a Writ of Habeas Corpus. However, of the claims on which the merits were reached, Weeks relies most heavily on Claims I, V, X, XVIII, XX, XXVI, XXVII, XXVIII, and XXIX. Petitioner maintains that these claims entitle him to conduct discovery, present evidence, and ultimately receive a Writ of Habeas Corpus. Respondent does not contest the ultimate recommendation of the Magistrate Judge, but does object to some specific rulings within the R & R. Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the court, having reviewed the record in its entirety, shall make a *de novo* determination of those portions of the Magistrate Judge's R & R to which petitioner and respondent have specifically objected.[2] The court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

In addition, there is an outstanding objection to the Magistrate Judge's January 23, 1997, Opinion and Order denying Weeks' request for expert assistance. This court will also review that decision and the corresponding objection. *See infra* part III.A.

Discussion

I. Preliminary Objections

Two of respondent's objections do not go to the Magistrate Judge's analysis of any particular claim, but to underlying findings that affect the standard of review used throughout the R & R. First, respondent objects to the Magistrate Judge's finding that Virginia does not satisfy the "opt-in" requirements in Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Respondent also objects to the Magistrate Judge's determination that petitioner's defaulted allegations are potentially reviewable under the "actual innocence" doctrine.

A. "Opt-In" Requirements

[1] With respect to the first objection, this court, by order dated November 21, 1996, affirmed this very finding by the Magistrate Judge.[3] Therefore, this court will treat respondent's objection as a motion to reconsider. For the following reasons, the court upholds its earlier decision and finds that Virginia does not meet the "opt-in" requirements of the AEDPA.

The AEDPA, which became effective on April 24, 1996, makes significant changes to the law of federal habeas corpus review, including creating a new Chapter 154 of Title 28 of the United States Code. Sections 101 through 106 apply generally to all federal habeas petitions. However, § 107 of the Act, which creates Chapter 154, applies specifically to petitions filed in capital cases. In addition to providing for expedited review, Chapter 154 affects habeas petitions in death penalty cases by narrowing the issues cognizable on federal habeas and by requiring federal courts to give even greater deference to state courts, prior resolution of issues presented in these petitions. *See* § 107(a).

Section 107 specifically states that it "shall apply to cases pending on or after the date of enactment of this Act." § 107(c). However, § 107 provisions, providing greater deference to state proceedings, are applicable only if the state meets the "opt-in" requirements set forth in § 107. To qualify for habeas benefits under the "post-conviction" prong of the "opt-in" provisions, a state must establish a mechanism that provides for the appointment, compensation, and reimbursement of competent counsel for all indigent capital de-

2. The court will generally follow the organization of the Magistrate Judge's R & R, discussing only those portions to which there are objections.

3. Respondent made this same objection on November 4, 1996, in relation to the filing schedule ordered by the Magistrate Judge. The schedule was not pursuant to the "opt-in" provisions, which require expedited review for qualifying states. This court's November 21, 1996, order was a summary order holding that Virginia does not satisfy the "opt-in" requirements of the Act.

fendants in its state post-conviction proceedings.[4] In other words, § 107 creates a "quid pro quo arrangement under which States are accorded stronger finality rules on federal habeas corpus review in return for strengthening the right to counsel for indigent capital defendants." *Satcher v. Netherland*, 944 F.Supp. 1222, 1238 (E.D.Va.1996) (quoting H.R.Rep. No. 23, 104th Cong., 1st Sess. 10 (1995)), *rev'd in part on other grounds sub nom. Satcher v. Pruett*, 126 F.3d 561 (4th Cir.), *and cert. denied*, — U.S. —, 118 S.Ct. 595, 139 L.Ed.2d 431 (1997).

Specifically, in order to "opt-in" a state must meet all four of the following criteria:

1. The State must establish by statute, rule of its court of last resort, or other agency authorized by state law a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital defendants. *See* § 2261(b).

2. Such mechanism must provide standards of competency for the appointment of such counsel. *See* § 2261(b).

3. Such mechanism must affirmatively offer counsel to all state prisoners under capital sentence. *See* § 2261(c).

4. Such mechanism must provide for the entry of a court order either appointing counsel to each indigent capital defendant, or explaining that such an appointment was not made on the basis that a defendant was not indigent or rejected the offer of counsel with an understanding of the legal consequences. *See* § 2261(c).

Although not always for identical reasons, other judges in this district have recently held that the Commonwealth of Virginia does not meet the qualifications of Chapter 154 of the AEDPA. *Wright v. Angelone*, 944 F.Supp. 460 (E.D.Va.1996) *see also Breard v. Netherland*, 949 F.Supp. 1255, 1261–62 (E.D.Va.1996), *aff'd sub nom. Breard v. Pruett*, 134 F.3d 615 (4th Cir.1998); *Satcher v. Netherland*, 944 F.Supp. 1222, 1238 (E.D.Va.1996). Virginia does clearly meet the third and fourth requirements, as applied in this case. As of July 1, 1995, the appointment of counsel in the post-conviction process became automatic.[5] Counsel was appointed for Weeks on October 10, 1995, and his state habeas proceedings became final on March 15, 1996. Accordingly, the state was in compliance with the third and fourth requirements of the "opt-in" provisions, using either date as the measuring point.[6]

[2] However, Virginia has failed to meet the first "opt-in" requirement. Virginia fails to meet the requirement of a comprehensive mechanism for the appointment, compensation, and payment of reasonable litigation expenses for counsel. *See Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.1996) ("the Virginia statutes and regulations do not specifically provide for compensation or payment of litigation expenses of appointed counsel, as § 107 requires"); *see also Satcher*, 944 F.Supp. at 1241–42 (for detailed discussions of why Virginia fails to meet the compensation requirement); *Wright*, 944 F.Supp. at

4. 28 U.S.C. § 2261. Virginia could also benefit from the special provisions if they qualify under another "opt-in" prong, which provides for "unitary review" procedures under § 2265. A unitary review procedure allows a person under a sentence of death to raise on direct review of the judgment such claims as could be raised on collateral attack. 28 U.S.C. § 2265. Virginia does not have such a procedure and therefore the provision does not apply. *See also Wright v. Angelone*, 944 F.Supp. 460, 462 (E.D.Va.1996).

5. Between July 1, 1992, and June 30, 1995, the appointment of counsel was made only upon request by the petitioner. Va.Code § 19.2–163.7 (prior to 1995 amendment). The *Satcher* and *Wright* courts both held that Virginia had not satisfied the third and fourth "opt-in" requirements in time to apply in those cases. *Satcher*, 944 F.Supp. at 1243–44; *Wright*, 944 F.Supp. at 463.

6. In *Wright*, the court held that the date of appointment is the appropriate date by which to judge the sufficiency of the state system. 944 F.Supp. at 463. However, in *Satcher*, the court judged Virginia's system as of the date petitioner's habeas petition was finally denied. 944 F.Supp. at 1243 (following dictum in *Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.)), *cert. denied*, — U.S. —, 117 S.Ct. 503, 136 L.Ed.2d 395 (1996). This court need not decide which is the better measuring event, as Virginia clearly is in compliance with the third and fourth "opt-in" requirements, using either of dates that are possibly applicable to Weeks.

464–65 (same). As Judge Payne held in *Satcher*, this requirement could only be satisfied by strict, rather than substantial compliance. *Satcher*, 944 F.Supp. at 1242. There has been no change in Virginia law, since the *Satcher* and *Wright* decisions, that would require a different outcome. Thus, the Commonwealth is not entitled to the special review that may be granted some states for their capital cases under Chapter 154.[7]

The other provisions in the AEDPA clearly do apply in this case, as the petition was filed well after April 24, 1996, the enactment date of the Act.

B. Actual Innocence Doctrine

[3] The Magistrate Judge examined Weeks' petition to determine if his procedurally defaulted ineffective assistance claims were reviewable under the "fundamental miscarriage of justice," or "actual innocence," doctrine. R & R at 27–31. The Magistrate Judge ultimately held that Weeks could not meet the required burden of proof, and thus his procedurally defaulted claims were not reviewable. *Id.* Respondent argues that the Magistrate Judge erred in even applying the "actual innocence" doctrine in petitioner's case. According to respondent, both 28 U.S.C. § 2264(a) and 28 U.S.C. § 2254(e)(2) dispense with any concept of "actual innocence of the death penalty."

Prior to passage of the AEDPA in 1996, the law was clear on the reviewability of procedurally defaulted claims. Generally, this court may not review claims that have been clearly and expressly defaulted under an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A state procedural default bars federal habeas corpus review of the claim, unless petitioner can show both justifiable *cause* for, and actual *prejudice* resulting from, his default. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87–88, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). If a petitioner cannot show "cause" and "prejudice" sufficient to excuse a procedural default, his claims may still be reviewed where refusal would result in a "fundamental miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 314–15, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Under this doctrine, if a constitutional violation has probably resulted in the conviction of someone who is actually innocent, the writ may be granted. *Schlup*, 513 U.S. at 323, 115 S.Ct. 851. To show "actual innocence of the death penalty," a petitioner must show "by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under [the applicable state law]." *Sawyer v. Whitley*, 505 U.S. 333, 347, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). It is only after meeting this very difficult burden that a petitioner may actually have his defaulted claims of constitutional error reviewed.

According to respondent, the "actual innocence of the death penalty" doctrine no longer provides a gateway for petitioners to have their defaulted claims reviewed on habeas. In support of this position, respondent first points to 28 U.S.C. § 2264(a). The statute provides, in pertinent part:

> (a) ... the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is
>
> (1) the result of State action in violation of the Constitution or laws of the United States;
>
> (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or
>
> (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim....

28 U.S.C. § 2264(a).

Section 2264(a) does seem to strictly limit the circumstances under which a defaulted

7. Since Virginia fails to satisfy the first requirement it is not necessary to determine whether the state satisfies the second requirement of establishing sufficient standards of competency for appointed counsel. *See Wright*, 944 F.Supp. at 466–67 (holding that Virginia fails to meet this requirement); *but see Satcher*, 944 F.Supp. at 1242–43 (holding that Virginia does meet the requirement for providing standards of competency).

claim may be reviewed by a federal district court.[8] However, § 2264 only applies once a state has qualified under Chapter 154 as an "opt-in" state. Because Virginia is not an "opt-in" state, § 2264(a) does not apply to Weeks' petition. *See supra* part I.A.

Respondent next points to 28 U.S.C. § 2254(e)(2)(B) in support of the Commonwealth's argument that the "actual innocence of death penalty" gateway is no longer available to petitioners seeking a review of their defaulted claims. Section 2254(e) provides:

> (1) [In a habeas corpus proceeding] a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Section 2254(e)(2) does limit the circumstances under which a court may order an evidentiary hearing to develop facts underlying a claim made by a petitioner. On its face, however, the provision does not speak to the issue of when a federal court may consider a *claim* that has been procedurally defaulted. Instead, the section only governs when a defendant has failed to develop facts underlying a particular claim. In such a situation, the defendant may or may not have failed to raise the related claim. The question of whether a defendant has previously raised a constitutional claim is clearly a separate issue from whether he has previously introduced certain evidence.

The state does not, however, argue that § 2254(e)(2) directly overrules or changes the applicable standard for deciding when a defaulted claim may be reviewed. Instead, the state's argument seems to be that, as a practical matter, § 2254(e)(2)(B) necessarily dispenses with the concept of actual innocence of the death penalty, since actual innocence of the *underlying offense* is the required showing for an evidentiary hearing.

It is true that, if a petitioner can only show innocence of the death penalty, and not of the actual crime, he may not be entitled to develop facts in an evidentiary hearing.[9] Accordingly, a petitioner could, for all practical purposes, be prevented from presenting a defaulted claim, even though he technically meets the miscarriage of justice standard. However, this will only be true when a hearing is needed to develop the facts underlying the raised claim. A claim may or may not have an underlying factual basis that needs further developing. If a petitioner does not

8. It is not clear to this court whether Congress's intention in writing 2264(a) was to completely eliminate the "actual innocence" exception in capital cases, or merely to strictly limit what could be considered "cause" under the cause and prejudice exception. In the past, the Supreme Court held that the miscarriage of justice exception would still allow successive claims to be heard even though the language, from which the exception developed, was removed from the relevant statute, 28 U.S.C. § 2244(b). *Sawyer*, 505 U.S. at 339, 112 S.Ct. 2514 (reciting the history of the "actual innocence" exception). Because § 2264(a) does not apply here, this court offers no opinion on the provision's precise effect.

9. The actual effect of 2254(e)(2)(B) on capital cases is not entirely clear. *See Cardwell v. Netherland*, 971 F.Supp. 997, 1009 (E.D.Va.1997) ("It is unresolved in this circuit whether the 'innocence' requirement of § 2254(e)(2)(B) requires a petitioner facing the death penalty to demonstrate innocence of the crime of which he was convicted or merely 'innocence of the death penalty.' "). For the purpose of this discussion, this court will assume that the state is correct, and that only a showing of actual innocence of the crime will satisfy the requirements for obtaining an evidentiary hearing.

need to introduce any evidence, or further develop any facts to advance his constitutional claim, then § 2254(e)(2) would not be applicable.

For instance, the claim of actual innocence of the death penalty may rely not on new facts, but rather on an error that allowed the introduction of erroneous information. It may be possible to show that, without such facts, no reasonable fact finder would have found the petitioner eligible for the death penalty. The Supreme Court has suggested that such an error would be a possible way to meet the actual innocence of the death penalty standard. *Smith v. Murray*, 477 U.S. 527, 538, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (holding that the habeas petitioner failed to show actual innocence of the death penalty because the "alleged constitutional error neither precluded the development of true facts nor *resulted in the admission of false ones.*"); *see also Sawyer v. Whitley*, 505 U.S. 333, 340, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992) (citing same passage in explaining the standard). Another example would be if a petitioner raises a claim that the jury was erroneously instructed on the law at sentencing. It may be possible to show that, but for the error, no reasonable juror would have found the petitioner eligible for the death penalty. In such cases, the limitations of § 2254(e)(2) would not apply because the petitioner would not be attempting to introduce any new evidence, or develop new facts that he previously failed to develop.

[4] In addition, the limitations of § 2254(e)(2) would not apply where the applicant did not "fail" to introduce the relevant factual evidence in state proceedings. This court agrees with other courts that have examined this issue, and have held that § 2254(e)(2) does not apply when a petitioner attempted to, but was denied the opportunity to develop the facts by the state courts. *See Cardwell v. Netherland*, 971 F.Supp. 997, 1009–12 (E.D.Va.1997) (for a thorough discussion of this provision of the statute); *see also Love v. Morton*, 112 F.3d 131, 136 (3d Cir.1997); *Burris v. Parke*, 116 F.3d 256 (7th Cir.1997); *Washington v. Mazurkiewicz*, 1997 WL 83771, at *2 n. 1 (E.D.Pa. Feb.25, 1997).

[5–7] By prefacing the requirements with "[i]f the applicant has failed to develop the factual bases of a claim" the statute, on its face, indicates that the above interpretation is the correct one. § 2254(e)(2). The statute seems to expressly apply only where the flawed fact-finding is somehow attributable to the petitioner.[10] In addition, as the *Burris* court held, "failure implies omission—a decision not to introduce evidence when there was an opportunity, or a decision not to seek an opportunity." *Burris*, 116 F.3d at 258. Furthermore, a strict liability interpretation would allow states to insulate "its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts." *Burris*, 116 F.3d at 259. If Congress had intended to create a type of strict liability statute, it could have easily provided that the requirements of § 2254(e)(2) apply whenever the factual basis of a claim was not developed in state court proceedings. Thus, where the faulty record is attributable to the state, and not the defendant, § 2254(e)(2) will not apply.[11] In conclusion, the court holds that § 2254(e)(2)(B) does not necessarily dispense with the concept of "actual innocence of the death penalty." The standard for determining when a procedurally defaulted claim may be reviewed has not been altered by the

10. Of course, omissions by counsel are also attributable to the client. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (holding that in absence of performance that is constitutionally ineffective, petitioner bears risk for all attorney errors that result in procedural default).

11. This interpretation also accords with the President's understanding of § 2254(e) when he signed Pub.L. 104–132 into law. He stated: "If [§ 2254(e) (as amended)] were read to deny litigants a meaningful opportunity to prove the facts necessary to vindicate federal rights, it would raise serious constitutional questions. I do not read it that way. The provision applies to situations in which 'the applicant has failed to develop the factual basis' of his or her claim. Therefore, [§ 2254(e) (as amended)] is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court." Statement of the President, Office of the Press Secretary, April 24, 1996.

general provisions of the AEDPA.[12] Accordingly, the reviewability of such claims are still governed by the standards developed by the Supreme Court, in cases such as *Murray v. Carrier* and *Sawyer v. Whitley*. 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Generally, a procedurally defaulted claim will not be reviewable. The exception is if a petitioner can show either (1) cause and prejudice for his default; or (2) that failure to hear the claims would constitute a "miscarriage of justice." See *Sawyer*, 505 U.S. at 338–39, 112 S.Ct. 2514. To meet the miscarriage of justice exception, the petitioner must show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Those petitioners who are sentenced to death may also meet the exception by showing through clear and convincing evidence that but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. *Sawyer*, 505 U.S. at 336, 112 S.Ct. 2514.

Whether an evidentiary hearing may be granted for the purpose of developing facts not previously developed in state court is an entirely separate question. In some cases, a constitutional claim will not need further factual development. In other cases, § 2254(e)(2) will not be applicable because the failure to develop facts in state court will not be attributable to the petitioner. Of course, it is also possible that a petitioner who meets the standard for having a defaulted claim reviewed, and who needs to further develop facts that he failed to previously develop, may not be able to make the showing required under § 2254(e)(2). Such a petitioner will thus be unable to develop the facts necessary to properly present his claim, even though his defaulted claim is technically reviewable under the applicable *Sawyer* standard. But whether that latter situation arises will depend on the particular claims raised and the particular circumstances of a petitioner's case.

12. As explained above, the standard has been changed in death penalty cases, but only for those cases that are in states which have "opted-in" to the special provisions of Chapter 154. 28 U.S.C. § 2264(a)

For the above reasons, the court finds that the Magistrate Judge did not err in evaluating petitioner's defaulted claims under the "actual innocence of the death penalty" standard to determine if his procedurally defaulted claims warranted review on the merits. The Magistrate Judge was also correct in finding that Virginia does not qualify for special review under Chapter 154, because it has not met the "opt-in" requirements.

II. Procedural Default

A. Ineffective Assistance Claims

Weeks' petition contained a number of ineffective assistance of counsel claims. Only Claims IX and XXXI are free-standing claims. Many of Week's other thirty-two substantive claims, however, contain ineffective assistance claims argued "in the alternative." Only one ineffective assistance claim, Claim IX, was raised in Weeks' state habeas petition. The other ineffective assistance of counsel claims were never presented to the Supreme Court of Virginia. In addition, Weeks' state habeas petition was never reviewed on the merits because it was dismissed by the Supreme Court of Virginia as untimely. Thus, none of petitioner's ineffective assistance of counsel claims were ever presented to Virginia's highest state court.

The Magistrate Judge found that all of Weeks' ineffective assistance of counsel claims were procedurally defaulted, due to both the untimely filing of his state habeas petition, and the omission of claims from the petition. In addition, the Magistrate Judge found that none of the defaults were excused by either the "cause and prejudice" or the "actual innocence" exceptions. Petitioner objected to each of these findings.

1. Untimely State Habeas Petition

[8] Weeks objects to the Magistrate Judge's conclusion that the dismissal of the state habeas petition for untimeliness was an adequate and independent state bar to federal review. Effective on July 1, 1995, prisoners under sentence of death were required to

comply with a statute of limitations for filing a habeas petition, and they were limited to filing an original petition in the Virginia Supreme Court. Va.Code §§ 8.01–654.1, 8.01–654(C)(1); Supreme Court Rule 5:7A. Weeks' counsel originally filed a petition for habeas corpus in the wrong court; he filed in the Circuit Court of Prince William County instead of the Supreme Court of Virginia. On December 1, 1995, the date on which the petition was due under the new statute of limitations, counsel withdrew the petition from the circuit court and mailed it, by regular mail, to the Supreme Court of Virginia. On March 15, 1996, the Supreme Court dismissed the petition as jurisdictionally barred because it was not timely.[13]

[9] Petitioner points out that a state procedural rule is not adequate to preclude federal court review of the merits unless that rule is both firmly established and regularly applied. *See Ford v. Georgia*, 498 U.S. 411, 424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991). Weeks argues that the rule applied to him in this case was not firmly established. According to petitioner, the rule of "dismissing untimely original habeas petitions" was not firmly established because the court had never before had an "opportunity to consider how it would treat an untimely habeas petition under its original jurisdiction." Petitioner's Objections at 9. Because there was no precedent dismissing original habeas petitions for untimeliness, petitioner maintains that the rule cannot be considered firmly established.

[10] This objection is without merit. As a general matter, procedural rules derived from unambiguous state statutes and supreme court rules are necessarily "firmly established." *O'Dell v. Netherland*, 95 F.3d 1214, 1241 (4th Cir.1996), *aff'd on other grounds*, — U.S. —, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997).[14] The applicable statute provides that "[n]o petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after ... denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal...." Va.Code § 8.01–654.1. This statute, which was relied on by the Supreme Court in dismissing Weeks' habeas petition, is clear and unambiguous. Accordingly, the Magistrate Judge correctly found that the Virginia Supreme Court's dismissal of Weeks' petition as untimely was a state ground "adequate" to bar federal habeas review. Thus, all of petitioner's claims of ineffective assistance are defaulted, including Claims IX and XXXI.

2. Cause and Prejudice

[11] Weeks objects to the Magistrate Judge's conclusion that the performance of his state habeas counsel does not excuse the procedural default of his claims. Petitioner argues that he has a constitutional right to effective state post-conviction counsel for the purpose of presenting claims that, as a matter of law, could not have been raised on direct appeal. In Virginia, claims of ineffective assistance of trial counsel may only be presented on collateral review, and not on direct appeal. *Goins v. Commonwealth*, 251 Va. 442, 470 S.E.2d 114, 124 n. 2(Va.), *cert. denied*, — U.S. —, 117 S.Ct. 222, 136 L.Ed.2d 154 (1996). According to petitioner, it follows that ineffective assistance of state habeas counsel does constitute cause for failure to raise ineffective assistance of trial counsel claims.

[12] Ineffective assistance of counsel may constitute "cause" for procedural default, under certain circumstances. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Attorney error will only constitute "cause" if, at the time of the error,

13. The Supreme Court of Virginia does not accept pleadings mailed but not received within the prescribed time limits unless they are sent by certified or registered mail. Supreme Court Rule 5:5(b).

14. In the case cited by petitioner, *Ford v. Georgia*, the new procedural rule was held to be not firmly established only because it was created *after* the time that petitioner would have had to obey the rule. 498 U.S. at 424–25, 111 S.Ct. 850. In this case, the rule is not being applied retroactively. The new rule for filing habeas petitions in death penalty cases was clearly in effect before Weeks was required to file his petition.

petitioner had a constitutional right to the assistance of counsel. *See Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The United States Supreme Court has established that, although there is a right to counsel on a first appeal as of right, there is no constitutional right to counsel on post-conviction collateral review. *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). However, the Supreme Court arguably, in *Coleman*, left open the possibility that there may be an exception to the rule of *Giarratano* and *Finley*, at least where state collateral review is the first place in which a prisoner can raise a particular claim. *Coleman*, 501 U.S. at 755, 111 S.Ct. 2546. The Supreme Court specifically declined to decide the question at that time. *Id.* If there is such a *Coleman* exception, a showing of ineffective assistance of counsel in state habeas could constitute cause for failure to raise Weeks' ineffective assistance of trial counsel claims.

However, the Fourth Circuit Court of Appeals has recently examined this very question, rejecting the argument advanced by Weeks. *Mackall v. Angelone*, 131 F.3d 442 (4th Cir.1997) (*en banc*), *cert. denied*, — U.S. —, 118 S.Ct. 907, 139 L.Ed.2d 922 (1998). The court explained that it was bound by the Supreme Court's controlling holding in *Finley* until it was actually overruled by the Supreme Court, and not merely questioned by the Court. *Id.* at 449. Accordingly, the Fourth Circuit held that Mackall did not have a constitutional right to counsel in his state habeas proceeding, even if that proceeding was his first opportunity to raise particular claims. *Id.* Thus, Mackall could not show cause to excuse the procedural default of his claims that his trial and appellate counsel were ineffective. *Id.*

Weeks makes the additional claim that, even if he had no Sixth Amendment right to counsel on state habeas, he had a due process right based on his state statutory right to counsel. However, for the reasons stated in the Report and Recommendation, Weeks has not shown that the due process clause was violated. Nor has he shown that such violation, if proven, would be equivalent to a violation of the Sixth Amendment Right to Counsel, such that it could constitute cause under *Coleman*, 501 U.S. at 752, 111 S.Ct. 2546 (holding that an error by counsel could constitute cause for defaulting a claim, but only if at the time of the error, petitioner had a constitutional right to the assistance of counsel).

Pursuant to *Mackall*, Weeks had no constitutional right to counsel on state collateral review, even though he had no opportunity to present his ineffective assistance of counsel claims at an earlier point. Consequently, Weeks cannot demonstrate cause to excuse the procedural default of his ineffective assistance of counsel claims.

3. Fundamental Miscarriage of Justice

[13] Petitioner objects to the Magistrate Judge's conclusion that Weeks did not meet the standard to have his defaulted ineffective assistance claims reviewed under the "miscarriage of justice" exception. For the following reasons, the Magistrate Judge did not err in finding that Weeks' defaulted ineffective assistance claims could not be reviewed.

Weeks does not claim that he is actually innocent of the murder of Trooper Cavazos, but only that he is "actually innocent" of the death penalty. In order to have any of his defaulted claims reviewed on the merits, Weeks is required to show by clear and convincing evidence that but for constitutional error, no reasonable juror would have found petitioner eligible for the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). In addition, a petitioner must focus "on those elements which render a defendant eligible for the death penalty, and not on additional mitigating evidence which was prevented from being introduced as a result of a claimed constitutional error." *Id.* at 347, 112 S.Ct. 2514. Accordingly, Weeks must show that he was actually ineligible for the death penalty under Virginia law, so that barring the constitutional error, no reasonable juror would have sentenced him to death.

Under Virginia law, a juror must find one of two aggravating factors for a defendant to be eligible for the death penalty: (1) that

there is a reasonable possibility that the defendant would commit criminal acts of violence which would constitute a continuing serious threat to society ("future dangerousness"); or (2) the defendant's conduct in committing the offenses was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim ("vileness"). Va. Code § 19.2-264.4(c). In Weeks' case, the Commonwealth presented evidence on the second factor, "vileness." The state focused on proving depravity of the mind and/or aggravated battery. *See* R & R at 29–30 (for description of evidence presented to support presence of both factors). The jury found the presence of "vileness," and subsequently imposed the penalty of death. The Virginia Supreme Court specifically found that both depravity of mind and aggravated battery were sufficiently established. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379 (1994), *cert. denied sub nom. Weeks v. Virginia*, 516 U.S. 829, 116 S.Ct. 100, 133 L.Ed.2d 55 (1995).

In order to have his ineffective assistance of counsel claims reviewed on the merits, Weeks must show that but for the ineffective assistance, no juror would have found the presence of the "vileness" aggravating factor. The Magistrate Judge was correct in noting that Weeks' "petition glosses over his claims of ineffective assistance for the most part, raising the claims in the alternative to substantive claims, addressing them in a cursory fashion." R & R at 30.[15] He never explains how the alleged ineffective assistance of counsel affected the finding of the presence of vileness, an aggravating factor. He certainly does not show by clear and convincing evidence that but for ineffective assistance of counsel, no jury would have found petitioner eligible for death.

In his petition, where he does argue ineffective assistance of counsel, petitioner merely argues that a "reasonable probability exists that, absent counsel's deficient performance occasioned by the trial court's error, the outcome at trial would have been different with respect to guilt and/or sentence." This is a restatement of the prejudice prong of the *Strickland* test. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, even if petitioner could meet the *Strickland* prejudice prong, that is not sufficient to meet the higher burden required to show actual innocence of the death penalty.[16]

Weeks, in his objections to the R & R, argues that the Magistrate Judge erred because "it is 'clear and convincing' that no reasonable juror would have sentenced Mr. Weeks if it were not for the denial of defense expert assistance and the ineffectiveness of trial counsel forced to proceed without such assistance." Petitioner's Obj. to R & R at 15–16. There are a number of separate assumptions comprising petitioner's argument.

According to petitioner, the state's entire aggravation case was built on the testimony of forensic and ballistic experts. "Thwarted by the court's repeated refusal not only to provide forensic and ballistic expert assistance, but also to permit the trial defense counsel to request such assistance in an *ex parte* hearing, Mr. Weeks' trial defense counsel was ineffective because he was barred from obtaining and using essential members of the trial team." Petitioner's Obj. to R &

15. Only Claims IX and XXXI were raised independently, and neither have any relationship to the finding that Weeks was eligible for the death penalty based on vileness. Claim IX alleges that Weeks' trial counsel was ineffective in advising him to plead guilty to grand larceny and use of a firearm. Claim XXXI simply alleges general ineffective assistance of trial counsel.

16. Of course, at the points where these claims of prejudice were raised, petitioner was assuming that the claims were in fact reviewable on the merits. Because petitioner, at that point, was arguing the merits of the ineffective assistance of counsel claims, he was only trying to show *Strickland* prejudice and not "actual innocence." Earlier in the petition, Weeks argued that his procedural default should be excused for cause due to the ineffectiveness of state habeas counsel. *See* Pet. at 36. Petitioner never actually argued in his petition that, in the alternative, the default should be excused under the "actual innocence" exception. However, the Magistrate Judge *sua sponte* chose to review the claims for such an exception, and the petitioner subsequently filed objections to the Magistrate Judge's conclusions. Accordingly, this court will review that portion of the R & R, as well as the corresponding objections, as if it had been raised in the petition.

R at 14–15. According to Weeks, this ineffective assistance of counsel affected the finding of the "vileness" aggravating factor because petitioner did not have the ability to challenge the Commonwealth's experts or present evidence in support of the defense theory of the case.

The court will assume for the sake of this discussion, as petitioner seems to, that the only evidence offered to show vileness came from the ballistic and forensic experts.[17] The court will also assume that, if Weeks had been granted his motion for the appointment of expert assistance, no jury would have found him eligible for the death penalty. Assuming all of that to be true, Weeks would still not have made the showing that is required to have his ineffective assistance of counsel claims reviewed.

[14–16] The "actual innocence" doctrine is a gateway through which a petitioner may have specific defaulted constitutional claims reviewed. To have a defaulted constitutional claim reviewed, petitioners are required to link their new evidence to that defaulted claim, with a showing that it is the claimed error which prevented the fact finder from adequately considering the evidence at trial. *Spencer v. Murray*, 18 F.3d 229, 236 (4th Cir.1994).[18] This is because the actual innocence exception "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). The habeas court does not sit to correct errors of fact, but to ensure that individuals are not imprisoned in violation of the constitution. *Id.* at 400–01, 113 S.Ct. 853.

The problem, in this case, is that the constitutional error, which petitioner is claiming should be reviewed, is not the alleged trial court error denying the motion for expert assistance. Instead, Weeks is arguing that his ineffective assistance of counsel claims should be reviewed. However, he never sufficiently explains precisely how his trial counsel was ineffective and how that ineffectiveness contributed to the finding of "vileness."

Petitioner essentially argues that, as result of the court's denial of expert assistance, his counsel's representation was rendered ineffective. *See* Petitioner's Obj. to R & R at 14; Pet. for Writ at 42. However, he does not actually point to an error by defense counsel that may have affected the jury's decision on vileness. Weeks does not point to anything done by counsel, which should not have been done, or anything counsel failed to do, which he should have done. An example of such error would be if counsel had failed to request the appointment of such assistance. In

17. Petitioner ignores the fact that most of the evidence relied on to show vileness and depravity of the mind did not come from the ballistics and forensic experts, and in fact consisted of many details of the crime that were admitted to by Weeks himself. Some of these facts are included in the following paragraph taken from the Supreme Court of Virginia's decision. "On probation, riding in a stolen vehicle, and possessing a weapon that the evidence showed had been used in a previous North Carolina murder, defendant shot the trooper at virtually point-blank range at least six times to avoid arrest.... The officer posed no threat to defendant in connection with this routine traffic stop; the trooper died with his service revolver still enclosed in its holster. Then, the defendant left and returned to the scene, falsely claiming that the attempted to render assistance to the victim when his real purpose was to retrieve incriminating evidence." *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 390–391 (1994).

18. The Fourth Circuit Court of Appeal has since questioned the correctness of *Spencer*, in light of the Supreme Court's decision in *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). *See O'Dell v. Netherland*, 95 F.3d 1214, 1246 n. 26 (4th Cir.1996) (The court pointed out that *Spencer* rested on *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), which was rejected by *Schlup* for claims of actual innocence of the crime itself, and that *Schlup* makes no mention of a "but for" requirement). However, the court has not yet overturned *Spencer*. *See O'Dell*, 95 F.3d at 1246 n. 26. Moreover, to the extent that the Supreme Court's decision in *Schlup* would affect the *Spencer* holding, it would only affect it with respect to claims of actual innocence of the crime itself. *Sawyer*, the case upon which *Spencer* relied, still governs the standard of review for claims involving actual innocence of the death penalty. *See Sawyer*, 505 U.S. at 333, 112 S.Ct. 2514 (petitioner must show "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law").

point of fact, Weeks' counsel did move for the appointment of expert assistance in a timely manner. In addition, there is no evidence that counsel could have done anything differently to persuade the court to change its mind and appoint such assistance.[19]

The court finds that petitioner has made no colorable showing of an underlying constitutional error by counsel that is related to the jury finding of eligibility for the death penalty. Thus, petitioner has clearly not met the standard required to show that a miscarriage of justice will result if his defaulted ineffective assistance of claims are not reviewed.

B. Claims Barred Under Supreme Court Rule 5:25

[17] Petitioner objects to the Magistrate Judge's finding that Weeks' Claims IV and XXIV are procedurally barred, and thus should be dismissed. The Supreme Court of Virginia had dismissed the claims on direct appeal under Supreme Court Rule 5:25. Rule 5:25 prohibits the consideration of errors which were not contemporaneously objected to at trial, and thus preserved for appeal.

The Magistrate Judge held that Rule 5:25 constitutes an adequate and independent state bar, such that a federal court may not review these claims unless the petitioner can demonstrate "cause" and "prejudice" for his default. The Judge further found that petitioner could not demonstrate cause to excuse his default. Petitioner objects to the finding that Rule 5:25 constitutes an adequate and independent state bar. Specifically, Weeks argues that the Rule is not firmly established and regularly followed, as required to be an adequate and independent procedural bar to federal review. *See Ford v. Georgia*, 498 U.S. 411, 423, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991); *James v. Kentucky*, 466 U.S. 341, 348–51, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984).

Although the adequate and independent determination is a federal question, the conclusion that a state does not require a contemporaneous objection is a significant determination, and "should not be reached lightly or without clear support in state law." *Meadows v. Holland*, 831 F.2d 493, 497 (4th Cir.1987) (*en banc*), *vacated on other grounds*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 575 (1989). According to the Fourth Circuit Court of Appeals, the effect would be to "substantially diminish the concept of finality in the operation of the state criminal justice system." *Id.*

This court's own careful *de novo* review of the decisions involving Virginia's contemporaneous objection rule convinces this court that this procedural bar satisfies the requirement of consistent application. Consequently, the rule constitutes an "adequate and independent state ground" upon which federal review may be precluded. Accordingly, the court does hereby adopt and approve the findings and recommendation of the United States Magistrate Judge related to Rule 5:25. *See* R & R at 31–33 (for a detailed discussion of Rule 5:25 as a procedural bar to federal review).

C. Claims Barred Due to Failure to Brief on Direct Appeal

[18] The Magistrate Judge held that Weeks' Claims II, III, VI, VIII, XVII, XXI, and XXIII are procedurally defaulted and should be dismissed. Petitioner objected to this recommendation, arguing that the claims were not defaulted,[20] or in the alternative,

19. Weeks does make the additional conclusory allegation that "Mr. Weeks' trial counsel rendered ineffective assistance in the defense of Mr. Weeks by failing to argue additional reasons in support of his position which would have caused the trial court to reverse itself." Pet. for Writ at 42–43, ¶ 149. This bare assertion is clearly insufficient to show that trial counsel was ineffective.

20. Weeks disagrees with the Magistrate Judge's characterization of the procedural posture of these claims. Weeks argues that the claims were exhausted because they were presented to the Supreme Court along with supporting arguments in the original 90 page brief. He alternatively argues that the claims are exhausted because the 50 page limit constitutes "circumstances ... that render [the state's] process ineffective to protect the rights of the applicant," such that they are exhausted under 28 U.S.C. § 2254(b)(1)(B)(ii). Weeks also cites the same provision in support of the argument that he was excused from presenting the claims and arguments to the state court.

that the default is excused because the state court deprived him of the ability to present the claims.

Weeks initially filed a ninety page brief assigning forty-seven errors in his appeal. In addition, Weeks filed a motion for leave to file an oversized brief because of the Rule limiting the page length of briefs to fifty pages. Supreme Court Rule 5:26. The Supreme Court denied Weeks' motion, and ordered him to file a second, conforming, fifty-page brief. In so doing, petitioner claims he was forced to eliminate all argument in support of a number of claims. Consequently, the Supreme Court of Virginia dismissed ten alleged errors, including the current Claims II, III, VI, VIII, XVII, XXI, and XXIII, for failure to brief.

The Supreme Court clearly expressed that it was dismissing these claims for failure to brief or argue the errors, a state procedural ground. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 383 (1994) (citing *Jenkins v. Commonwealth*, 244 Va. 445, 423 S.E.2d 360, 364 (1992)). Failure to brief is an adequate and independent state ground for dismissing claims. As asserted by the Magistrate Judge, "[i]t would be completely unreasonable to expect a court to decide 'on the merits' a claim that was not briefed or argued. Thus, the only option for the [Virginia Supreme] Court in this case, faced with petitioner's unsupported and conclusory claims, was to dismiss those claims on procedural grounds." R & R at 38. Furthermore, petitioner offers no argument that the rule is not regularly or consistently applied, such that it may not be considered an adequate state ground.

In petitioner's supplemental authority for his objections, filed on November 13, 1997, Weeks points to an Eighth Circuit case to support an argument that the claims were not defaulted. However, *Clemmons v. Delo*, 124 F.3d 944 (8th Cir.1997), is clearly distinguishable from this case. In *Clemmons*, the Missouri Supreme Court had refused to consider a particular claim on the merits. There the claim had been included in a *pro se* supplemental brief, which the state court had refused to consider. The Eighth Circuit held that the claim had been fairly presented to the state court; in other words, that there was no procedural default. *Id.* at 948–49. This decision was based on the court's finding that there was no regularly applied state procedural rule, such that it was an adequate ground supporting a procedural bar. *Id.* at 948 n. 3. According to the court, the Missouri Supreme Court sometimes allows *pro se* briefs, and sometimes does not, with no regularly applied criteria. *Id.* As explained above, the Virginia Supreme Court's rule of refusing to consider claims that have not been briefed is regularly applied. As such, it is an adequate and independent state ground barring review.

[19] Petitioner argues, however, that the claims dismissed by the Supreme Court were not adequately briefed because of the imposition of the fifty-page limit. According to petitioner, this page limitation constitutes cause sufficient to excuse his procedural default. The existence of cause for procedural default must ordinarily turn on whether petitioner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). In this case, though, the actual cause of counsel's failure to properly brief particular claims was not the fifty-page limit, but was the strategic choice made by counsel to focus on particular claims.

However, it does appear that in this case the page limitation actually precipitated defense counsel's decision to make this strate-

See Petitioner's Obj. to R & R at 18. However, § 2254(b)(1) has no bearing on whether a procedural default may be excused, such that it can be reviewed on the merits. Section 2254(b)(1) bears only on the exhaustion doctrine. Furthermore, petitioner is conflating the issues of exhaustion and default. As explained by the Magistrate Judge, all of petitioner's claims are clearly exhausted at this point, regardless of the reasoning. R & R at 35–36. Both parties, as well as this court, are in agreement that petitioner's claims have been exhausted. The only issue here is whether these particular claims are procedurally defaulted by Weeks' failure to brief, and whether the default is excused such that this court may review the claims on the merits.

gic choice.[21] However, this page limitation is not unreasonable.[22] Nor is the resulting consequence that appellate counsel must make choices as to which claims to press problematic. As the Supreme Court has noted,

> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little as 15 minutes—and when page limits on briefs are widely imposed.... A brief that raises every colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, 'go for the jugular,'—in a verbal mound made up of strong and weak contentions.

Jones v. Barnes, 463 U.S. 745, 752–53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). In addition, it would make no sense if a rule, which is itself a reasonable and consistently applied state procedural rule, could constitute cause for failing to comply with another rule. All procedural rules, whether working alone or in conjunction with others, impose restrictions on litigants. It is entirely reasonable for a state to expect a litigant to comply with all of its procedural rules, as long as all of the rules are themselves reasonable and are not arbitrarily imposed.

For the above reasons and the reasons stated in the R & R, this court does hereby adopt and approve the United States Magistrate Judge's findings and recommendation that Claims II, III, VI, VIII, XVII, XXI, and XXIII are procedurally defaulted and should be dismissed. *See* R & R at 33–34.

D. Claim Barred Due to Improper Briefing on Direct Appeal

[20] The Magistrate Judge held that Weeks' Claim XXXIII is procedurally defaulted and should be dismissed. Petitioner objected to this recommendation, arguing that the procedural bar was not adequate or in the alternative, that the default is excused because the state court deprived him of the ability to present the claims.

The Supreme Court of Virginia refused to consider Claim XXXIII on direct appeal because Weeks had impermissibly incorporated by reference a memorandum filed on the subject in the trial court. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (1994) (citing *Jenkins v. Commonwealth*, 244 Va. 445, 423 S.E.2d 360, 370 (1992), for the proposition that the defendant has an obligation to state clearly to an appellate court the grounds for asserting that the trial court's ruling is erroneous, and that cross-reference to arguments presented at trial is insufficient). The *Jenkins* rule is an adequate and independent ground for dismissing claims. It is a reasonable procedural rule and there is no indication that it is arbitrarily or inconsistently applied. As such, unless Weeks can demonstrate cause and prejudice for the procedural default, the claim may not be reviewed on the merits by this court.

[21] The only cause expressed by petitioner is the briefing limitation of fifty pages. As discussed above, this limitation does not constitute cause for Weeks' procedural defaults on appeal. *See supra* part II.C. Accordingly, the court does hereby adopt and approve the United States Magistrate Judge's findings and recommendation that Claim XXXIII is procedurally defaulted and should be dismissed. *See* R & R at 39–40.

E. Claims Barred Due to Failure to Raise on Direct Appeal

[22] Petitioner objects to the Magistrate Judge's finding that Weeks failed to raise Claims XXX and XXXII in the state courts, such that these claims are now procedurally barred from review. After a *de novo* review of the record, the court agrees with the Magistrate Judge that Claims XXX and XXXII were never raised in state court. These claims would clearly be procedurally barred if Weeks attempted to bring them before a state court at this time.[23] Furthermore, the alleged ineffective assistance of state habeas counsel does not excuse petitioner's default of either claim, for the reasons stated previously. *See supra* part II.A.2.

Accordingly, the court does hereby adopt and approve the United States Magistrate Judge's findings and recommendations that Claims XXX and XXXII are procedurally defaulted and thus may not be reviewed on their merits. *See* R & R at 40–42.

F. Conclusion

For the above reasons, the following Claims are considered procedurally defaulted, and will not be reviewed by this court on their merits: II, III, IV, VI, VIII, IX, XVII, XXI, XXIII, XXIV, XXX, XXXI, XXXII, XXXIII. In addition, all of Weeks' ineffective assistance of counsel claims are procedurally defaulted and will not be reviewed.

III. Standard of Review

A. Motion for Summary Judgment

[23] Petitioner objects to the Magistrate Judge's statement of the standard governing a motion for summary judgment on the ground that it is incomplete. First, petitioner points out that the Magistrate Judge failed to mention that respondent has an initial burden in a motion for summary judgment. Accordingly, this court notes that the party seeking a summary judgment does bear the initial responsibility of informing the district court of the basis for its motion, and of identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). It is at that point that the opposing party must come forward and make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322, 106 S.Ct. 2548. This is the legal standard being applied herein by this court.

Second, petitioner points out that a summary judgment is inappropriate where a party has been denied discovery or other opportunity to develop material facts. Petitioner maintains that he has been denied an opportunity to develop material facts, by the Magistrate Judge's denial of expert assistance. According to Weeks, the assistance of a ballistics expert and forensic pathologist is necessary for him to support Claim I of his petition, in which he argues that the trial court's refusal to provide expert assistance violated his rights under the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

On December 24, 1996, petitioner filed his motion and brief in support of the motion for authorization to obtain expert assistance. The Magistrate Judge denied the request on January 23, 1997. On February 5, 1997, petitioner filed objections to the Magistrate Judge's Opinion and Order. However, Weeks' petition for a writ of habeas corpus was filed on February 7, 1997, and his objection to the Magistrate Judge's decision on the request for experts was never ruled on by this court. Consequently, this court will now review the Magistrate Judge's Opinion and Order, along with petitioner's objection.

[24] Pursuant to 28 U.S.C. § 636(b)(1)(A), the district court may "designate a magistrate to hear and determine any pretrial matter pending before the court." Following the magistrate's ruling, a "judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law." *Id.*; *see also* Fed.R.Civ.P. 72(a). The decision of whether to appoint experts is a pretrial mat-

21. Other factors could also precipitate such a strategic choice by counsel, such as the belief that the defendant has a better chance of winning on appeal by pressing only the strongest claims, rather than obscuring the strong ones with many weak claims. Of course, this factor is more relevant to the claims Weeks defaulted because of a complete failure to raise them. *See infra* part II.E.

22. The Federal Courts of Appeals and the United States Supreme Court both limit opening briefs to 50 pages. Fed.R.App.P. 28; U.S. S.Ct. R. 33.1.

23. The claims would be barred by both: (1) Virginia's abuse of the writ statute, Va.Code § 8.01–654(B)(2), prohibiting the filing of a second habeas petition on grounds known at the time of filing the first petition, and (2) Va.Code § 8.01–654.1, which states that in death penalty cases habeas petitions will not be reviewed by the Supreme Court unless it is filed within 60 days of the completion of all direct appeal remedies.

ter, and thus will be reviewed under the clearly erroneous standard.[24]

Petitioner contends that the Magistrate Judge applied the incorrect standard in deciding his request for expert assistance pursuant to 21 U.S.C. § 848(q)(9). He further maintains that the denial of the ballistics expert and forensic expert was clearly erroneous under the correct standard. This court finds that the Magistrate Judge did utilize an incorrect standard in determining the request. However, this court upholds the ultimate decision denying expert assistance, albeit for different reasons.

[25, 26] Petitioner's motion is for the appointment of a forensic pathologist and ballistics expert to assist him in the preparation of his petition for a writ of habeas corpus. Specifically, he seeks the assistance of experts to prepare his claim that his defense was prejudiced by the trial court's refusal to appoint such experts. He maintains that such experts were necessary for him to adequately present a defense on the issues of premeditation and vileness. The motion for experts was pursuant to 21 U.S.C. § 848(q)(9), which states:

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant, and if so authorized, shall order the payment of fees and expenses therefor under paragraph (10).

21 U.S.C. § 848(q)(9). Thus the question essentially reduces to whether the appointment of ballistic and forensic experts were reasonably necessary to Weeks in presenting his petition for § 2254 relief. The statute does not define reasonably necessary. However, courts have held that expert assistance is not reasonably necessary where an evidentiary hearing at which the testimony could be presented will not be held. *See Lawson v. Dixon*, 3 F.3d 743, 753 (4th Cir.1993); *see also Fuller v. Johnson*, 114 F.3d 491, 502 (5th Cir.) (experts not reasonably necessary where such testimony would be procedurally barred), *cert. denied*, — U.S. —, 118 S.Ct. 399, 139 L.Ed.2d 312 (1997); *Cardwell v. Netherland*, 971 F.Supp. 997, 1007 (E.D.Va. 1997) (experts not reasonably necessary if evaluations cannot be introduced); *Burris v. Parke*, 948 F.Supp. 1310, 1327 (N.D.Ind.1996) (experts not reasonably necessary where evidence cannot be introduced because petitioner is not entitled to an evidentiary hearing), *aff'd*, 116 F.3d 256 (7th Cir.1997). Accordingly, if petitioner's claim, for which he requests the expert assistance, cannot be reviewed on the merits, or if he would not be able to win on the merits regardless of the expert's finding, the appointments are not necessary for the petition.

The Magistrate Judge concluded that experts were not reasonably necessary because even if the requested experts fulfilled Week's expectations, he could not show prejudice. However, in determining that petitioner could not show that the trial court's denial of experts prejudiced him, the Magistrate Judge erroneously relied upon the Supreme Court's decision in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In *Jackson*, the Supreme Court held that the habeas court, viewing the evidence in the light most favorable to the prosecution, must ascertain whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 318–19, 99 S.Ct. 2781. The Magistrate Judge, in applying that standard to this case, held that "[i]f a rational juror could still reasonably decide to impose the death sentence in the face of this new evidence, then the experts would make no practical difference to Weeks' habeas petition and hence cannot be reasonably necessary." Opinion and Order at 9 (January 23, 1997).

The Magistrate Judge proceeded to examine the evidence introduced at trial in light of the "vileness" prong of the Virginia death penalty statute. He then held that if Weeks' experts had testified at trial as Weeks hoped they would, "that additional evidence would not entitle Weeks to a ruling that no rational juror could find 'depravity of mind and/or aggravated battery.'" Opinion and Order at 16 (January 23, 1997). Consequently, the court found that the requested forensic pathologist and ballistics expert were not "reasonably necessary" under § 848(q)(9).

24. This is in contrast to the *de novo* review accorded the Magistrate Judge's recommendations on dispositive matters, to which objections have been made. *See* Fed.R.Civ.P. 72(b).

However, *Jackson* announced the standard of review for a federal habeas court determining, on the merits, whether sufficient evidence exists to support a state court conviction. *Jackson*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. The *Jackson* standard would be relevant if Weeks wanted the experts to help prove a claim that there was insufficient evidence to support a conviction. His claim, for which he seeks assistance, though, is not that there was insufficient evidence to convict him, or even that there was insufficient evidence to sentence him to the death penalty. His underlying claim is that the trial judge violated his due process rights when he denied him expert assistance at trial.

[27] Petitioner can prevail on such a habeas claim if he can show that the state's decision was contrary to clearly established federal law, pursuant to § 2254(d), and that the error was not harmless. In showing that the trial error was not harmless, i.e., that he was prejudiced, the *Jackson* standard is not the relevant standard. The Supreme court has directed federal courts on collateral review to apply the standard set forth in *Kotteakos* to trial errors. *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Thus federal courts must determine whether the trial error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). The Fourth Circuit Court of Appeals has held that the *Brecht* harmless-error standard applies to a trial court's refusal to grant expert psychiatric assistance. *Tuggle v. Netherland*, 79 F.3d 1386 (4th Cir.), *cert. denied*, — U.S. —, 117 S.Ct. 237, 136 L.Ed.2d 166 (1996).

Accordingly, the Magistrate Judge, in deciding whether the trial court's decision prejudiced Week's, should have asked whether the denial of experts had a substantial and injurious effect or influence on the jury's sentencing decision. If it is clear that the denial did not have such a prejudicial affect, regardless of what the experts could offer and regardless of whether the denial was an error, Weeks would not be able to prevail on the merits of his claim. And consequently, the expert assistance would not be "reasonably necessary."

[28] Although the Magistrate Judge incorrectly analyzed the request for expert assistance, Weeks nevertheless is not entitled to the requested assistance. Furthermore, this court need not determine whether the trial court's decision was harmless, under even the *Brecht* standard. This court cannot grant Weeks' petition for a writ of habeas corpus, based on the state's denial of expert assistance, because it is clear that the state's decision was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Because petitioner cannot prevail on this claim, the requested expert assistance is not "reasonably necessary" for this proceeding.

The Fourth Circuit has recognized that an indigent defendant has a right to the assistance of an expert, if "a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance." *Williams v. Martin*, 618 F.2d 1021, 1026 (4th Cir.1980) (quoting *Jacobs v. United States*, 350 F.2d 571, 573 (4th Cir.1965)). However, the United States Supreme Court has not directly held that there is a federal constitutional right to non-psychiatric experts. In *Ake*, the Supreme Court case relied on by petitioner, the Court held that the state must provide an indigent defendant with a competent psychiatrist, provided the "defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Although there was some broad language in *Ake*, which could potentially be applied to a variety of circum-

stances,[25] the precise holding was limited to the facts of that case. That case only involved a request for psychiatric expert assistance. *Id.*

The Fourth Circuit recently refused to examine a habeas claim, which was similar to Week's request for experts, under the "new rule" doctrine.[26] *Gray v. Thompson*, 58 F.3d 59 (4th Cir.1995), *vacated on other grounds*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996). In that case, the petitioner maintained that the state court's refusal to appoint a private investigator for the defense contravened due process. *Id.* at 66. The Fourth Circuit stated that the "Supreme Court has flatly declined to address the question whether, 'as a matter of federal constitutional law[,] what if any showing would [entitle] a defendant to [private] assistance.'" *Gray*, 58 F.3d at 66 (citing *Caldwell v. Mississippi*, 472 U.S. 320, 323–324 n. 1, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)). The court went on to hold that by resolving that question, the court would clearly be breaking new constitutional ground. *Id.* at 66; *see also George v. Angelone*, 901 F.Supp. 1070, 1085 (E.D.Va.1995) (relying on *Gray* in refusing to decide the merits of habeas petitioner's claim that the trial court's failure to appoint an investigator deprived him of due process), *aff'd on other grounds*, 100 F.3d 353 (4th Cir.1996).

There is no reason to believe that the Fourth Circuit would treat a claim based on denials of ballistic and forensic experts differently than a claim based on the denial of an investigator. The Supreme Court, in *Ake*, did not refer to any non-psychiatric experts. More importantly, in *Caldwell*, the petitioner had requested the appointment of a criminal investigator, a fingerprint expert, and a ballistic expert. In that case, the Supreme Court was referring collectively to all three types of experts when it held that "there was no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought." *Caldwell*, 472 U.S. at 323–24 n. 1, 105 S.Ct. 2633. At least one other circuit has held that an extension of *Ake* to other kinds of experts would create a new rule under the Supreme Court's prior holdings. *See, e.g., Jackson v. Ylst*, 921 F.2d 882, 885–86 (9th Cir.1990) (the court declined to review the merits of the claim that a denial of an expert on eyewitness identification violated due process, because it would impose a new obligation on the states in violation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)).

Under § 2254(d), a petition for habeas can only be granted if the state's decision was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. *See infra* part III.B. Pursuant to the Fourth Circuit's decision in *Gray*, resolving Week's claim in his favor would require the court to announce a "new rule" of constitutional law in violation of *Teague*. Certainly, if such a decision is not permissible under *Teague*, it would also not be permissible under the AEDPA's more restrictive standard of review.[27] If finding for

25. "We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake*, 470 U.S. at 76, 105 S.Ct. 1087.

26. Under the "new rule" doctrine, before a claim of a federal constitutional violation can be reviewed, the district court must first determine whether the relief sought would create a new rule under [the Supreme Court's] holdings. *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). "If so, [the court can] neither announce nor apply the new rule ... unless it would fall into one of two narrow exceptions." *Id.* at 486, 110 S.Ct. 1257. A "new rule" is "a rule that 'breaks new ground,' 'imposes a new obligation on the States or Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.'" *Id.* at 488, 110 S.Ct. 1257 (quoting *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)).

27. Petitioner asserts that the Supreme Court of Virginia never decided this claim on the merits, and that this court should therefore review the claim *de novo*, without reference to § 2254(d). However, this does not help Weeks with his claim. If § 2254(d) does not apply, the "new rule" analysis of *Teague* would apply. Whether reviewed under the *Teague* and *Gray* analysis, or under § 2254(e), the rule sought by Weeks cannot be applied to his case on habeas.

petitioner would require declaring a "new rule," such a rule could not have been clearly established federal law, as determined by the Supreme Court, at the time the state made its decision in this case.

Because this court could not find in Week's favor on his claim that he was denied due process when the trial court refused to provide expert assistance, expert assistance is not "reasonably necessary" for this proceeding.

B. Standard of Review Under the AEDPA

The court agrees with and hereby adopts the Magistrate Judge's interpretation of the standard of review under the Antiterrorism and Effective Death Penalty Act of 1996. *See* R & R at 44–52. As each of petitioner's arguments, which underlie his current objections to the Magistrate Judge's interpretation of the AEDPA, were thoroughly discussed in the R & R, this court sees no reason to simply repeat petitioner's arguments as well the court's rejection of them as meritless.[28] However, for the sake of clarity, the court will briefly summarize the applicable standard of review.

The AEDPA is generally applicable to Weeks' case, because his petition was filed well after the April 24, 1996, enactment date of the Act. *See Lindh v. Murphy*, 521 U.S. 320, ——, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997) (holding that the new provisions of chapter 153 generally apply to cases filed after the [AEDPA] became effective).[29] The newly amended 28 U.S.C. § 2254(d) establishes the standard of review to be applied by a federal court considering a state prisoner's petition for habeas relief. Section 2254(d) provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[29] A federal district court must first determine whether there is a state decision on the "merits" with respect to a particular claim. Section 2254(d) applies to any claim adjudicated on the merits in state court. Contrary to the argument advanced by petitioner, a decision by a state court that summarily dismisses a petitioner's claim as meritless is an adjudication on the merits within the meaning of § 2254(d). *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir.) (holding that "perfunctory" state court rulings are nonetheless evaluated pursuant to § 2254(d) for reasonableness), *cert. denied*, —— U.S. ——, 118 S.Ct. 72, 139 L.Ed.2d 32 (1997); *see also Parker v. Angelone*, 959 F.Supp. 319, 320 (E.D.Va.1997) (decision by state court summarily dismissing petitioner's claim as "frivolous" is an "adjudication on the merits"); *McLee v. Angelone*, 967 F.Supp. 152 (E.D.Va. 1997) (holding that § 2254(d) does not require an explanatory decision from the state court). The statute only requires the reviewing court to examine the ultimate decisions of the state court and compare that decision to "clearly established federal law."

However, the practical significance of § 2254(d)'s new standard of review will certainly be lessened in cases where the state court offers no explanation for its decision. *See Cardwell v. Netherland*, 971 F.Supp. 997,

28. Weeks had raised the same arguments contained in his objections to the R & R in "Petitioner's Response in Opposition to Respondent's Motion to Dismiss." Petitioner raised a number of arguments regarding the applicability of the AEDPA, as well as its constitutionality.

29. The specific provision of § 107 of the AEDPA, however, is not applicable. Although § 107 contains several provisions pertaining specifically to capital defendants, these provisions are applicable only if the state meets the "opt-in" requirements set forth in § 107. As explained above, Virginia does not meet the qualifications of § 107, thus precluding its applicability to this case. *See supra* part I.A.

1015 (E.D.Va.1997). In cases where there is no indication of *how* the state court came to its decision, it will obviously be more difficult for the federal court to judge whether the ultimate determination *involved an unreasonable application* of federal law. As explained by the Court of Appeals for the Seventh Circuit:

> [O]f course the better the job the state court does in explaining the grounds for its rulings, the more likely those rulings are to withstand further judicial review. That is just realism. It doesn't follow that the criterion of a reasonable determination is whether it is well reasoned. It is not. It is wether the determination is at least minimally consistent with the facts and circumstances of the case.

Hennon, 109 F.3d at 335.

[30] If there is such a qualifying state decision on the merits, the writ shall not be issued unless one of the statutory exceptions is met. Section 2254(d)(1) governs the standard of review for legal claims. A federal court may grant a petition if it finds that the state decision was contrary to clearly established federal law, or involved an unreasonable application of clearly established federal law. This section abrogates the *de novo* review that was required under *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953).[30] As stated by the Magistrate Judge, "the focus of federal court review is now the state court decision that previously addressed the claims rather than the petitioner's freestanding claims themselves." R & R at 46. By changing the focus of review, the Act increases the respect due state decisions.

[31] However, the review of legal claims is still *de novo* in the sense that federal courts must independently determine whether the state court decision is correct under federal law. For this reason, the AEDPA is not unconstitutional as argued by Weeks. The AEDPA does not require any state decision to be upheld where the decision is "contrary to" or is "an unreasonable application of" federal law. Thus, the Act does not eliminate the Judicial power of the federal judiciary to say what the law is, as required by Article III of the United States Constitution.

[32] The AEDPA altered habeas review in a more fundamental way, by mandating a strict choice-of-law rule. In comparing the state decision to clearly established federal law, it is the law "as determined by the Supreme Court of the United States" that prevails. Federal courts are no longer permitted to rely on their own jurisprudence in addition to that of the Supreme Court. Thus, Weeks must be able to point to an authoritative decision of the Supreme Court in order to secure a writ. *See Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir.1996).

Section 2254(d)(2) dictates the standard of review applicable to claims based on pure questions of fact. When a petition for habeas relief is based on a challenge to a factual determination, before granting an application for a writ, the federal court must find that the state decision was based on an *unreasonable* determination of the facts in light of the evidence presented in state court. § 2254(d)(2). In addition, factual determinations made by a State court shall be presumed to be correct and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. § 2254(e)(1).

[33] Petitioner also objects to footnote 20 of the Report and Recommendation. Weeks interprets the R & R as finding that the AEDPA supplants the harmless error standard outlined in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). This court does not read the Magistrate Judge's R & R the same way. The Magistrate Judge simply stated that "[u]nder pre-Act law, this petition would be decided under the standard outlined in [*Brecht*]," which is historically a correct statement. The Judge then briefly explained why most

30. Prior to passage of the AEDPA, review was *de novo* in the strictest sense of that term. Under the *Brown v. Allen* line of cases, insofar as petitions presented questions of law or mixed questions of law and fact, federal courts were required to treat the petitions as a wholly new complaint. Federal courts were required to treat state court adjudications in the particular case as nothing more than a potentially relevant authority from the court of last resort of another jurisdiction. *Brown*, 344 U.S. at 458, 73 S.Ct. 397.

of Weeks' claims could not meet the *Brecht* harmless error standard. He never made any reference to the status of *Brecht* post-AEDPA.

However, to the extent that Weeks is correct in his interpretation of the Report and Recommendation, this court holds that there is nothing in the new law which would overrule or contradict *Brecht*. Under *Brecht*, a petitioner is not entitled to habeas relief based on trial error unless he can establish that it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638, 113 S.Ct. 1710; *see also Watson v. Boone*, 131 F.3d 153, 1997 WL 741165 (10th Cir.1997) (unpublished decision) (applying *Brecht* harmless error standard to trial error in case that was reviewed under AEDPA). Thus, even if Weeks shows that the state court incorrectly found a claim to be meritless, in that the decision was contrary to clearly established federal law, he must still show that the proven trial error was not harmless under the *Brecht* standard of review.

IV. Findings of Fact and Conclusions of Law

Respondent objects to the Report & Recommendation on the ground that the Magistrate Judge erred by finding particular claims reviewable. According to the Commonwealth, Claims I, V, VII, XVIII, XIX, XX, XXII, and XXV should not be reviewed on the merits on federal habeas.

With respect to Claim I, this court has already determined that the claim is not reviewable on the merits. *See supra* part III.A. With respect to Claims V and VII, respondent maintains that Weeks failed to preserve the issue as a federal constitutional claim on direct appeal. It is clearly established law that if a habeas petitioner wishes to claim that a state trial court denied him the due process of law guaranteed by the Fourteenth Amendment, he must have said so in state court. *See Duncan v. Henry*, 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (*per curiam*); *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.) (explaining that in order to preserve the right to collateral review in federal court, petitioner must have fairly presented the substance of the federal claim to the state court), *cert. denied sub nom. Matthews v. Moore*, — U.S. —, 118 S.Ct. 102, 139 L.Ed.2d 57 (1997).

In the present case, there is no question that the Supreme Court of Virginia was alerted to the fact that petitioner was asserting these claims under the United States Constitution, in addition to the Virginia Constitution. For each of the claims, petitioner clearly argued that the trial court's decision constituted a violation of particular provisions of the Constitution of the United States. *See* Br. of Appellant to S.Ct. of Va. at 27–29 (Assigned Error 11 & 12), 22–24 (Assigned Error 3). Accordingly, the Magistrate Judge was correct in reviewing Claims V and VII on the merits.

Respondent also argues that Claim XVIII was not raised as a constitutional issue on direct appeal. However, as with the above claims, petitioner fairly presented the claim as a federal constitutional claim to the Supreme Court of Virginia. Not only did petitioner state in his argument that his rights under the United States Constitution were violated, he also explained how the introduction of hearsay can violate a defendant's Sixth Amendment right to confrontation. *See* Br. of Appellant to S.Ct. of Va. at 41 (Assigned Error 30), 39 (Assigned Error 27, cross referenced in Assigned Error 30).

Respondent maintains that Claims XVIII, XIX, XX, XXII, and XXV raise only questions of state law, and do not rise to the level of federal constitutional claims. It is true that any error in state law or procedure that does not implicate the Constitution or laws of the United States is not reviewable on federal habeas corpus. *See* 28 U.S.C. § 2254(a) ("district court shall entertain an application for a writ of habeas corpus ... only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"). For the following reasons, each of these claims do raise federal constitutional issues.

As to Claim XVIII, respondent cites *Davis v. Greer* for the proposition that a hearsay claim is solely a state law matter, and does not raise a federal constitutional claim. 13

F.3d 1134, 1139 (7th Cir.1994). However, the court in *Davis* held that any violation of the hearsay rule at *sentencing* is a matter of state law, as the Sixth Amendment Confrontation Clause does not apply at sentencing. The Confrontation Clause certainly does apply during trials, and a violation of the hearsay rule can implicate that clause. *Id.* In this case, to the extent that the claim is only a hearsay claim, petitioner clearly argues that the admission of hearsay during *trial* violated his rights under the Constitution. Accordingly, this objection by respondent has no merit.

Similarly, respondent's objections as to the reviewability of Claims XIX and XXII are also without merit. Respondent argues that each of these claims raise evidentiary questions, which according to respondent are only state law issues. According to respondent, the Report & Recommendation "ignores the distinction between a mere error of state law and one that is so egregious as to render the trial fundamentally unfair." Respondent's Obj. to R & R at 7, ¶ 11.

However, it is clear that the violation of a state evidentiary rule can also constitute a violation of the United States Constitution. Respondent fails to realize that, once a constitutional violation is adequately alleged, in order to determine whether the error is merely one of state law or is in fact a violation of the United States Constitution, the court must review the claim on its merits. In reviewing each of the claims, the Magistrate Judge did ultimately hold that none of alleged errors were contrary to, or an unreasonable application of, federal law. As an initial matter, however, the Magistrate Judge correctly held that Weeks adequately presented the factual and legal basis of his federal constitutional claims, so that this court could review the claims on their merits.

For the same reasons, respondent's objection to the court's review of Claim XXV on the merits must also be overturned. In Claim XXV, petitioner argues that the trial court committed error by not submitting a particular instruction to the jury. Respondent argues that this claim is merely a state procedural issue. However, errors relating to jury instructions can clearly rise to the level of a due process violation, depending on the particular circumstances. The Magistrate Judge was correct in finding that Weeks adequately alleged a violation of his federal constitutional rights, so that it may be reviewed on the merits.

In addition to arguing that Claim XX only raises a state law claim, respondent argues that Claim XX is not reviewable because it goes far beyond the limited claim raised on direct appeal. First, as with the above claims, Claim XX also sufficiently alleges a federal constitutional violation. However, this court must agree with respondent's second argument. Although the headings of Assigned Error 20, the claim on direct appeal, and Claim XX are similarly worded, the Commonwealth is correct that the arguments raised under the claims are actually very different.

At trial, evidence was offered to show that the gun used by Weeks in the murder of Trooper Cavazos had also been used by another individual in an earlier murder committed in North Carolina. The evidence showed that Weeks received the gun, knowing both that it had been used in a murder, and that the police were looking for the gun. Thus, the history of the gun was not offered to show that Weeks was involved in the commission of the North Carolina murder. It was offered to show motive, intent, and knowledge in the Cavazos murder.

In Assigned Error 20, Weeks argued that there was insufficient evidence to show that Weeks was an accessory after the fact to the North Carolina murder, and thus the evidence implying as much should not have been admitted. *See* Br. of Appellant to S.Ct. of Va. at 35 (Assigned Error 20). Although present Claim XX relates to admissibility of the same evidence, different arguments are relied upon than were referred to on direct appeal. In Claim XX, petitioner argues that the evidence was irrelevant and that any probative value was outweighed by its prejudicial effect, thus violating his due process rights under the United States Constitution. Petition for a Writ at 125–31. In addition, Weeks argues that jurors received no necessary guidance, direction, or limitations on their consideration of this evidence, and that

this failure conflicts with the due process clause and the Eighth Amendment. *Id.* at 128. None of these issues or arguments were raised in the direct appeal brief. Accordingly, Claim XX was not "fairly presented" to the Supreme Court of Virginia so that the State had the requisite "opportunity to pass upon and correct alleged violations." *See Henry*, 513 U.S. at 365, 115 S.Ct. 887.

In conclusion, the Magistrate Judge's conclusion that Claims V, VII, XVIII, XIX, XXII, and XXV are reviewable on their merits was correct. However, the Magistrate Judge erred in addressing the merits of petitioner's Claim XX, which addressed the admission of evidence related to the history of the gun used in the murder. In addition, as explained earlier, the Magistrate Judge erred in addressing the merits of Claim I. *See supra* part III.A. Accordingly, this court will not address the merits of Claim I or XX, but will address the merits of Claims I, V, VII, XVIII, XIX, XXII, and XXV.

A. Claim V

[34] Petitioner objects to the Magistrate Judge's conclusion that Claim V is without merit. In Claim V, Weeks argues that he was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments when he was not allowed to make an *ex parte* showing on his claim for expert assistance.

The trial judge refused to allow petitioner to make his application for a ballistics expert and forensic pathologist *ex parte*. The Supreme Court of Virginia, held that Weeks' rights were not violated by the denial of an *ex parte* hearing. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (1994).

Under federal criminal procedure, there is clearly a statutory right to an *ex parte* hearing. 18 U.S.C. § 3006A(e)(1). However, the United States Supreme Court has never held that there is a constitutional right to an *ex parte* hearing. In *Ake*, the Court did make a reference to an *ex parte* hearing, but the court did not hold that such a hearing is constitutionally required. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

For these reasons, and the additional reasons stated in the Report and Recommendation, petitioner cannot show that the Supreme Court of Virginia's decision was contrary to, or an unreasonable application of, federal law. Accordingly, this claim is without merit.

B. Claim VII

[35] Petitioner objects to the Magistrate Judge's conclusion that Weeks was not entitled to a Bill of Particulars, and that the Supreme Court of Virginia did not err in upholding the trial court's decision denying Weeks' request for one. The trial court denied petitioner's request for a Bill of Particulars. The Supreme court of Virginia held that a Bill of Particulars was not required under *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227, 232–33 (1991). *See Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (1994).

Weeks makes two distinct arguments supporting his claim: (1) that the mandatory nature of Va.Code § 19.2–266.2 creates a liberty interest in receiving a Bill of Particulars, the denial of which violated his due process rights under the federal Constitution; and (2) the Sixth Amendment entitles a defendant to be informed of the nature and cause of the accusation against him. However, neither argument has merit.

The Supreme Court of Virginia has made clear that § 19.2–266.2 does not entitle a defendant to a Bill of Particulars as a matter of right. *See Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218 (1991) (holding that whether the Commonwealth is required to file a Bill of Particulars is a matter within the discretion of the trial court); *see also Strickler*, 241 Va. 482, 404 S.E.2d 227(1991) (holding that when an indictment is sufficient to give the accused "notice of the nature and character of the offense charged so he can make his defense" a Bill of Particulars is not required). In this case, Weeks never challenged the sufficiency of the indictment. Thus, the trial court judge did not err under Virginia law in denying a Bill of Particulars, and consequently did not deny Weeks any state created liberty

interest, in violation of the due process clause.

Furthermore, there is no constitutional right to a Bill of Particulars. *United States v. Bales*, 813 F.2d 1289 (4th Cir.1987). Weeks was essentially seeking detailed discovery of all of the prosecution's evidence against him. However, he cannot point to any United States Supreme Court case in support of his theory that the denial of a Bill of Particulars was in violation of his rights under the federal Constitution.

For these reasons, and the reasons stated in the Report and Recommendation, petitioner cannot show that the Supreme Court of Virginia's decision was contrary to, or an unreasonable application of, federal law. Accordingly, this claim is without merit.

C. Claim X

Petitioner objects to the Magistrate Judge's conclusion that Weeks cannot meet the required burden with respect to Claim X. Weeks maintains that the trial court's refusal to strike Juror Pama for cause was unreasonable, and deprived Weeks of due process, effective assistance of counsel, and a fair trial.

Juror Pama had a close relative that was shot to death in the course of his duty as a police officer. Weeks argues that Juror Pama's answers during voir dire were ambiguous, and the statements combined with the context of the questioning suggest that he could not be fair and impartial. *See* R & R at 64–65 (for relevant portions of voir dire of Juror Pama). According to petitioner, the context of the questioning by the prosecutor would have put pressure on Pama to strive to be judged "fair and impartial, laudatory attributes." Pet. Obj. at 44. In addition he argues that, "a college graduate working on a Master's degree, knew what answers he had to give to be deemed "fair and impartial." *Id.* at 45. In reviewing this claim, the Supreme Court of Virginia held that the trial court did not commit error in refusing to dismiss Pama for cause. *Weeks*, 450 S.E.2d at 389.

[36] Although this court may have ruled differently than the trial judge if it had presided over the trial, how this court would have ruled is not the relevant standard. It is well-settled that a question of whether a member of the venire should be excluded for cause is a factual finding. *Wainwright v. Witt*, 469 U.S. 412, 429, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *see also Patton v. Yount*, 467 U.S. 1025, 1036–37, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (holding question of individual juror's partiality is one of fact, and state court determination is entitled to presumption of correctness). Under § 2254(e)(1) a determination of a factual issue made by a state court shall be presumed to be correct. This presumption can only be overcome by clear and convincing evidence. Furthermore, the trial judge is in the unique position to directly view and evaluate a juror and this court may not substitute its own judgment upon review of the transcript. *See Maynard v. Dixon*, 943 F.2d 407 (4th Cir. 1991) (holding trial judge has wide discretion in deciding whether to excuse juror for cause and in evaluating a juror's responses, inflections, and gestures).

As pointed out by the Magistrate Judge, there was nothing inherent in Juror Pama's situation that rendered him unable to perform his duties. The trial judge found him to be credible, and believed Pama's statements that he could put aside any prior knowledge or feelings, and that he could render a fair and impartial verdict.[31] Petitioner has not rebutted by clear and convincing evidence the presumption of correctness accorded state findings of fact. For these reasons, and the reasons stated in the Report and Recommendation, Weeks cannot show that the state court's decision was based on an unreasonable determination the facts under § 2254(d)(2). Accordingly, this claim is without merit.

31. The fact that Juror Pama is a graduate student, and thus supposedly "knew what answers he had to give to be deemed 'fair and impartial,'" is clearly not sufficient reason to find him incredible, let alone substitute that determination of credibility for the trial judge's. There is no reason to believe that Pama had an ulterior motive to appear unbiased. More importantly, a review of Pama's answers, if anything, indicate the candor with which he was answering the questions.

D. Claims XI and XII

[37] Petitioner objects to the Magistrate Judge's conclusion that the trial judge did not abuse its discretion in refusing particular proposed voir dire questions pertaining to the jurors' beliefs on life imprisonment and the death sentence. Weeks argues that he should have been allowed to ask two proposed questions: (1) "Do you believe that if the Defendant is sentenced to death that the sentence will be carried out?"; (2) "Do you believe that if the Defendant were sentenced to life imprisonment that he would spend the remainder of his life in prison?"

According to petitioner, these questions were necessary to determine "the possible existence of a belief which could substantially impair the performance of a juror in accordance with the instructions given to him and his oath." Petitioner's Obj. to R & R at 46. The Supreme Court of Virginia held that "the trial court did not abuse its discretion in disallowing [any of the proposed] questions because they were either improper, vague, argumentative, or nonspecific." *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (1994).

In this case, the Supreme Court of Virginia's decision is not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. The first question was supposedly based on the principles outlined in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). In *Caldwell*, the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328–29, 105 S.Ct. 2633. In that case, the prosecutor had led the jury to believe that ultimate responsibility for the sentencing decision rested with other decision makers who would be reviewing the jury's decision.

In *Weeks'* case, there were no impermissible arguments made to the jury. *Caldwell* does not speak to the appropriateness of questions on voir dire. In fact, the underlying assumption in *Caldwell* seems to be that sentencers normally treat their power to determine the appropriateness of death as an "awesome responsibility." *Id.* at 329, 105 S.Ct. 2633. The issue in *Caldwell* only arose because the state actively altered what would be the normal perception of jurors. In this case, there was no reason to believe that the jurors would not believe they had an "awesome responsibility."

The second question was supposedly designed to find out if jurors believed that a defendant sentenced to life imprisonment would be out within a few years. According to Weeks, a juror who believed accordingly would be more likely to impose death. He maintains that such a question is required under *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), to ensure that all jurors will be able to set aside their views, and follow the judge's instructions and their oaths.

The first and most obvious problem with counsel's argument is that the proposed question does not ask jurors if they believe that a defendant sentenced to life imprisonment will be out in a few years. The question instead asks jurors whether they believe that a defendant with a life sentence would spend the "remainder of his life in prison." This is a very different question. An answer of "no" to the proposed question does not indicate that the juror believes a prisoner will be out in only a few years. A juror could answer "no," that he does not believe such a defendant will spend the rest of his life in prison, because he believes the defendant will be eligible for parole in twenty-five years.[32] In addition, an answer of "no" to the proposed question does not necessarily mean that a juror will be more likely to impose a death sentence regardless of the mitigating evidence offered, or that such a juror would not follow the law, as instructed by the judge.

An adequate voir dire is part of the Sixth Amendment right to an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222,

32. Twenty-five years is, in fact, when Weeks would have been eligible for parole if he had been sentenced to life imprisonment.

119 L.Ed.2d 492 (1992). However, the above question is not required under *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), as claimed by petitioner, to ensure that all jurors will be able to set aside their views, and follow the judge's instructions and their oaths. The trial judge did ask members of the jury panel the following: if "the jury were to convict the defendant of capital murder, would you be able to consider voting for a sentence less than death?" Trial Tr. at 42 (Oct. 18, 1993). This question is standard in capital cases, and is designed to weed out prospective jurors whose "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (internal citation omitted). In addition, the judge asked prospective jurors whether they "know of any reason whatsoever why you could not sit and give a fair and impartial trial to the Commonwealth and to the accused, based solely on the law which I will give you and the evidence that you will hear and see in this courtroom?" Trial Tr. at 43 (Oct. 18, 1993).

The above questions were sufficient to ensure that the jurors would be able to set aside their views, including a view that a life sentence could result in an early release from prison, and follow the judge's instructions and their oaths. For the reasons stated here and in the R & R, the decision to refuse the proposed questions was not contrary to, and did not involve an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Accordingly, this claim is without merit.

E. Claim XIII

[38] Petitioner objects to the Magistrate Judge's conclusion that Claim XIII is without merit. According to Weeks, the trial judge deprived him of due process and a fair trial when he refused to allow certain proposed voir dire questions regarding racial bias. *See* R & R at 73–74 (for list of denied questions).

[39, 40] Petitioner relies on *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), for the argument that his proposed questions should have been allowed. It is clearly established law that Capital defendants accused of an interracial crime are entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. *Id.* at 36, 106 S.Ct. 1683. At the same time, though, the Supreme Court specifically held that the rule is "minimally intrusive; as in other cases ... the trial judge retains discretion as to the form and number of questions on the subject" of race. *Id.* The Supreme Court has indicated that even where inquiry is constitutionally required because of inextricably involved racial issues, confining the questioning to a single brief general question may be "sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain." *Ham v. South Carolina*, 409 U.S. 524, 527, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973) (question "[w]ould you fairly try this case on the basis of the evidence and disregarding the defendant's race" held to be sufficient).

In this case, the trial court did allow two questions on the issue of racial bias that were much more specific than the question referred to in *Ham*: (1) Would you disapprove of a member of your family marrying a person of a different race for that reason only?; (2) Do you believe that persons of African descent are more likely to commit crimes than other persons of other races? Trial Tr. at 52 (Oct. 18, 1993). The judge used his discretion to deny the other proposed questions as open-ended, argumentative, and ineffectual. The Supreme Court of Virginia held that "the trial court did not abuse its discretion, in this case of a white victim and a black accused, in the manner which it questioned the prospective jurors on the subject of potential racial bias." *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (1994) (citing *Turner v. Murray*, 476 U.S. 28, 37, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) for support).

For the above reasons, and the reasons stated in the Report and Recommendation, the Supreme Court of Virginia's decision on this question was not contrary to, or an unreasonable application of, clearly established federal law. Accordingly, this claim is without merit.

F. Claim XIV

[41] Petitioner objects to the Magistrate Judge's conclusion that Claim XIV is without merit. According to Weeks, the trial judge deprived him of due process and a fair trial when he refused to allow certain proposed voir dire questions regarding bias in favor of the death penalty. *See* R & R at 76–77 (for list of denied questions).

Petitioner relies on *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) for the argument that his proposed questions should have been allowed. In *Wainwright*, the Supreme Court held that the proper standard for determining when a prospective juror may be excused for cause because of his views on capital punishment ... is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *Id.* at 424, 105 S.Ct. 844. Accordingly, a defendant has a right to conduct a voir dire adequate to ensure that none of the members of the jury would "unwaveringly impose death after a finding of guilt," regardless of mitigating factors and no matter how instructed on the law. *Morgan v. Illinois*, 504 U.S. 719, 733–34, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

The trial court did allow a number of questions that were related to the imposition of the death penalty and the possibility that a potential juror may not be able to perform his duties in accordance with the instructions and his oath. The judge, however, denied some questions as argumentative, open-ended, and without a sufficient factual basis for the prospective jurors to intelligently respond. The Supreme Court of Virginia upheld the trial judge's decision, holding that the questions were either improper, vague, argumentative, or nonspecific. *Weeks*, 450 S.E.2d at 388.

The questions that were allowed were adequate to identify those who would automatically vote for the death penalty. *See Mackall v. Angelone*, 131 F.3d 442, 451 (4th Cir.1997) (*en banc*), *cert. denied*, — U.S. —, 118 S.Ct. 907, 139 L.Ed.2d 922 (1998). For this reason, and the reasons stated in the Magistrate Judge's Report and Recommendation, petitioner cannot show that the decision of the Supreme Court of Virginia was contrary to, or an unreasonable application of, clearly established federal law. Accordingly, this claim is without merit.

G. Claim XV

Respondent and petitioner have each objected to the Magistrate Judge's analysis of Claim XV. Respondent objects to the Magistrate Judge's conclusion that the second conversation between Special Agent Rowland of the Virginia State Police and Weeks amounted to an interrogation within the meaning of *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).[33] Petitioner objects to the Magistrate Judge's conclusion that the interrogation was not a violation of Weeks' Fifth Amendment right to remain silent.

1. Interrogation

[42] The second conversation between Weeks and Special Agent Rowland clearly constituted an interrogation within the meaning of *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). According to the United States Supreme Court, the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. *Id.* at 300–01, 100 S.Ct. 1682. The Court went on to define what is meant by the phrase "functional equivalent." This term was defined as any "words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response" from the suspect. *Id.* at 301, 100 S.Ct. 1682. This definition is intended to focus the analysis upon the perceptions of the suspect, and not the intent of the police. *Id.*

In this case, defendant was clearly in custody at the time of the second conversation with Agent Rowland. Weeks was read his

33. The Supreme Court of Virginia assumed, without deciding, that the conversation was an interrogation. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 386 (1994).

Miranda rights at approximately 7:40 a.m. on February 24, 1993, by Officer Rowland, who had become suspicious of him during their conversation. Weeks invoked his Fifth Amendment right to remain silent, and questioning immediately ceased. At approximately 7:52 a.m., Weeks was arrested by Rowland, after he had received information that the driver of Weeks' vehicle had identified Weeks as the gunman. From that point on, Weeks remained continually in the custody of the police. At 6:00 p.m., Weeks was brought in handcuffs and leg irons, to the lounge of the local prosector's office where Agent Rowland again spoke with Weeks. It is this last discussion at 6:00 p.m. that is the subject of both parties' objections.

Because Weeks was clearly in custody at the time of the second conversation, the decisive question is whether he was subjected to questioning or its functional equivalent. The relevant facts surrounding the second conversation are as follows: After asking Weeks if he remembered the rights read to him earlier, Rowland proceeded to summarize the investigation through the course of the day's events to that point in time. This summary included telling Weeks that an eyewitness to the shooting had made a positive identification of him as the assailant. In fact, the truth was that a witness had identified defendant as a person she saw at the scene after the homicide, but that she had not actually witnessed the shooting. At the conclusion of this summary, Rowland told Weeks that, "[t]his is your opportunity to provide your explanation as to what happened at the shooting scene." Weeks responded by stating "Yes, I was packing." He then proceeded to confess to the trooper's murder.

The interaction between Weeks and Agent Rowland was clearly an interrogation under *Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297. Apparently, the respondent would have the court find that the final statement by Rowland was not a question, or words designed to elicit a response, simply because there is no question mark at the end of the statement. This court sees no practical difference between what was actually said and the following questions: "Will you take this opportunity to explain what happened at the shooting scene?" or "Do you want to tell me what happened at the shooting scene?" The officer should have known that his statement, indicating that he was providing Weeks with the opportunity to explain his side, and immediately following the recitation of evidence against Weeks, was reasonably likely to elicit an incriminating response. More than likely, Officer Rowland's very intent, or at least hope, was to illicit a confession from Weeks.

The cases cited by the Commonwealth in its supporting brief are inapposite to the question of whether the above interaction constituted an interrogation. First, respondent cites *Ray v. Duckworth*, 881 F.2d 512, 518 (7th Cir.1989), for the proposition that there is nothing objectionable if an officer merely informs a suspect about the nature of the evidence against him. However, whether it is objectionable to inform a suspect about the nature of the evidence against him is not the issue. The issue is whether the officer's statements constituted an "interrogation." The issue in *Ray* was not whether there was an interrogation, but whether the interrogation that took place was coercive. *Id.* In addition, the officer did not merely inform the suspect about the nature of the evidence against him. As explained above, he misrepresented some of the evidence. A deliberately false statement indicates that the officer's intention was not simply to keep Weeks informed about matters relating to the charges against him, as respondent would have this court believe was the case here. *See* Respondent's Brief at 69.

[43] Second, respondent cites *Shedelbower v. Estelle*, 885 F.2d 570 (9th Cir.1989), for the argument that an officer's false statement is not necessarily equivalent to an interrogation. While this may be true, a false statement is also certainly not evidence that there was not an interrogation. If anything, false statements that are deliberately made do indicate an intent to illicit an incriminating response. Although the Supreme Court held in *Innis* that the focus of the inquiry is not on the officer's intent, the officer's intent is also not irrelevant. *See Innis*, 446 U.S. at 302 n. 7, 100 S.Ct. 1682 (holding that an officer's intent "may well have a bearing on

whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response").

2. Fifth Amendment Right

[44] According to petitioner, his Fifth Amendment right to remain silent was violated when Agent Rowland interrogated him at 6:00 p.m. in the Commonwealth Attorney's lounge. The Supreme Court of Virginia held that there was no violation of *Miranda* as a result of the reinterrogation, and the trial court, therefore, did not err in refusing to suppress Weeks' statements. *Weeks*, 450 S.E.2d at 386–87.

In considering this issue on appeal, the Supreme Court of Virginia analyzed the facts of this case under the appropriate standard. *Id.* The court compared the circumstances of Week's interrogation to the five factors the United States Supreme Court had found relevant in determining that a "suspect's right to cut off questioning was scrupulously honored." *See Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

This court finds, for the reasons stated in the Report and Recommendation, that the decision of the Supreme Court of Virginia was not contrary to, or an unreasonable application of, the Supreme Court's decision in *Mosley*. *Id.*

H. Claim XVI

[45] The court agrees with respondent that *Stone v. Powell* bars any review of this claim on the merits. 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) (holding that Fourth Amendment claims are not reviewable by federal courts on habeas petitions). However, the court disagrees with respondent that the Magistrate Judge may have suggested otherwise. Although the Magistrate Judge correctly pointed out that the claim was not procedurally *defaulted* by Weeks, he stated that "[u]nfortunately for Weeks, this claim is clearly barred under the rule in *Stone v. Powell*." Accordingly, this objection by respondent merits no further discussion.

The petitioner objects to the Magistrate Judge's finding that the bar of *Stone* applies in this case, and to his refusal to address the merits of this claim. According to Weeks, *Stone* is inapplicable because his claim addresses the *suppression* of evidence derived from the alleged improper *Terry* stop, and not the legality of the *Terry* stop itself.

This distinction is frivolous. First, the question of whether evidence should have been suppressed obviously cannot be addressed without addressing the legality of the seizure. A review of Weeks' petition proves this point, as his discussion focuses almost entirely on trying to show that the *Terry* stop was an illegal seizure.

Second, this claim is precisely the type of claim *Stone* was addressing. The precise holding of *Stone* was that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained through an unconstitutional search or seizure was introduced at his trial." *Stone*, 428 U.S. at 494, 96 S.Ct. 3037. Weeks' claim is that the failure to suppress all evidence derived from an improperly conducted *Terry* stop deprived him of due process and a fair trial. Accordingly, *Stone* is clearly applicable to Weeks' claim.

The Magistrate Judge correctly found that *Stone* applies to this claim. Because Weeks has not shown that the state failed to provide a full and fair opportunity for litigation, this claim is barred from review on the merits.

I. Claim XVIII

Weeks objects to the Magistrate Judge's conclusion that Claim XVIII lacks merit. Claim XVIII alleges that petitioner was denied various rights under the Constitution due to the Commonwealths' improper questioning of witness Daniels and the trial court's failure to correct those errors.

On cross-examination the defense attorney questioned Daniels as to any benefit he hoped to receive in exchange for his testimony. In response, Daniels stated that he hoped to receive protection from the state. On redirect the prosecutor asked, "why do you feel that you need protection?" To which Daniels replied, "threats have been

made against me by, we can say, Mr. Weeks' admirers." Defense counsel objected to this testimony, and the objection was overruled on the grounds that the defense "opened the door" to this testimony. The Supreme Court of Virginia held that defendant's assignment of error on this issue was without merit. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 390 (1994).[34]

[46, 47] First, it must be noted that Daniels' statement was not hearsay. It was not offered for the truth of the matter asserted, but to explain why Daniels believed he needed protection. And to the extent that the statement may have been prejudicial to Weeks, the defense opened the door to the testimony. For this reason, and the reasons stated in the Report and Recommendation, petitioner has not shown that the Supreme Court of Virginia's decision was contrary to, or an unreasonable application of, federal law. Accordingly, this claim is without merit.

J. Claim XIX

[48] Petitioner objects to the Magistrate Judge's conclusion that Claim XIX lacks merit. Under Claim XIX, Weeks argues that the trial court unreasonably allowed Special Agent Rowland to testify as to Weeks' credibility and ultimate culpability, in violation of his right to a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

During trial, Agent Rowland testified that, while interviewing Weeks, he learned that the driver of Weeks' car, Weeks' uncle, had stated that Weeks had done the shooting. The trial court, over defendant's objection, then allowed Rowland to testify that after learning this information he believed Weeks had not been telling him the truth during his interview of Weeks. The Supreme Court held that Assigned Error 20, which was based on this statement, had no merit. *Weeks*, 450 S.E.2d at 390.[35]

As explained by the Magistrate Judge, "it is clear from the transcript, and would have been clear to the jury, that Rowland was merely stating what was in his mind at the time." R & R at 90. For this reason, and the additional reasons stated in the Report and Recommendation, the petitioner has failed to show that the decision of the Supreme Court of Virginia was contrary to, or an unreasonable application of, federal law. Accordingly, this court finds that this claim is without merit.

K. Claim XXII

[49] Petitioner objects to the Magistrate Judge's conclusion that Claim XXII lacks merit. In Claim XXII, Weeks argues that the trial judge erred by allowing the prosecution to enter into evidence the criminal records of this former co-defendants, during the penalty phase of his trial. According to Weeks, this evidence violated his due process rights under the Constitution because the evidence was irrelevant and inflammatory.

In attempting to show future dangerousness, one of the statutory aggravating factors that can trigger a sentence of death, the Commonwealth presented evidence concerning Weeks' 1992 conviction for drug trafficking. The Commonwealth's witness, M.W. Casey, a North Carolina Detective, was allowed to testify about the records of Weeks' co-defendants in that case, over Weeks' objection. The trial court allowed the testimony to show the "background and environment" in which he operated his business. The Supreme Court of Virginia, held that this issue was without merit. *Weeks*, 450 S.E.2d at 390.[36]

[50] The admissibility of evidence is generally a matter of state law. "Absent a showing that the admission of the evidence violated a specific constitutional guarantee, a federal court can issue a writ of habeas cor-

34. This is one of the miscellaneous evidence claims that was dismissed as meritless without any discussion by the Supreme Court of Virginia.

35. This is one of the miscellaneous evidence claims that was dismissed as meritless without any discussion by the Supreme Court of Virginia.

36. This is one of the miscellaneous evidence claims that was dismissed as meritless without any discussion by the Supreme Court of Virginia.

pus on the basis of a state court evidentiary ruling only when that ruling violated the defendant's right to due process by denying him a fundamentally fair trial." *Milone v. Camp*, 22 F.3d 693, 702 (7th Cir.1994). The petitioner has not shown that the admission of evidence was so prejudicial that it fatally affected the sentencing phase and deprived him of a fair trial. Moreover, the trial court's determination that the evidence was relevant to future dangerousness was not an unreasonable application of federal law.

For these reasons, and the reasons stated in the Report and Recommendation, petitioner has failed to show that the state court's decision was contrary to, or an unreasonable application of, federal law. Accordingly, this court finds that this claim is without merit.

L. Claim XXV

[51] Petitioner objects to the Magistrate Judge's conclusion that Claim XXV is without merit. Weeks claims that the trial court violated his due process rights and his right against cruel and usual punishment by responding inappropriately to a jury question.

During deliberations, the jury asked the following question: "Does the sentence of life imprisonment in the State of Virginia have the possibility of parole, and if so, under what conditions must be met [sic] to receive parole?" The trial court responded by telling the jury, "You should impose such punishment as you feel is just under the evidence, and within the instructions of the Court. You are not to concern yourself with what may happen afterwards." Weeks objected to this response, proposing that the court instead instruct the jury to presume that their sentence would be carried out.[37] The trial court overruled this objection. On direct appeal, the Supreme Court of Virginia denied this issue as meritless. *Weeks*, 450 S.E.2d at 390.[38]

For the reasons stated in the Report and Recommendation, petitioner cannot show that the state court decision was contrary to, or an unreasonable application of, federal law, as determined by the United States Supreme Court.

M. Claims XXVI and XXVII

[52] These claims, as well as the next two, are closely related. Each of the claims call into question whether the jury was adequately informed on the effect it could give to mitigating evidence. More specifically, petitioner maintains that the jury was mislead into believing that, if they found the presence of an aggravating factor, they did not have to consider mitigating evidence, and that they had to impose the death penalty.

In Claim XXVI, petitioner maintains that his constitutional rights were violated when the trial court refused the following proposed jury instruction: "Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the Defendant to life in prison." In Claim XXVII, petitioner argues that his rights were further violated when the court, instead of reading Weeks, proposed instruction, gave the following instruction:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death; or, if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment....
>
> If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the

37. The court notes that, in his objection, petitioner focuses on a different aspect of this claim: The fact that he was denied the opportunity to present his own accurate evidence regarding his ineligibility for parole for a minimum of 25 years. As explained by the Magistrate Judge, this issue was procedurally defaulted by petitioner because it was never presented to the Supreme Court of Virginia. *See* R & R at 98–99. Accordingly, this particular portion of Claim XXV was not, and cannot be, addressed on the merits.

38. This is one of the miscellaneous evidence claims that was dismissed as meritless without any discussion by the Supreme Court of Virginia.

punishment of the defendant at life imprisonment....

According to Weeks, a juror reading the first clause, of the first paragraph, might believe that he could impose the death penalty upon a finding of an aggravating factor, without having to consider any evidence in mitigation. *See Penry v. Lynaugh*, 492 U.S. 302, 317–18, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (a sentencer may not be precluded from considering, and may not refuse to consider any constitutionally relevant mitigating evidence). Weeks also maintains that the word "or," combined with the language of the second clause, could lead a juror to believe that he could not sentence Weeks to life imprisonment once the jury found an aggravating factor. This interpretation is possible if a juror understood the words "is not justified" to mean that the defendant is not eligible for the death penalty. *See Buchanan v. Angelone*, — U.S. —, ——-—, 118 S.Ct. 757, 764–65, 139 L.Ed.2d 702 (1998) (Breyer, J., dissenting).

[53] Weeks' proposed jury instruction is certainly a clearer statement of the law than the instruction actually given to the jury. However, the issue is whether the instruction given was unconstitutional, not whether alternative instructions would have been better. The governing principle is that restrictions on the jury's sentencing determination must not preclude the jury from being able to give effect to mitigating evidence. *See Buchanan*, — U.S. at —, 118 S.Ct. at 761. The standard for determining whether jury instructions satisfy this principle is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* (citing *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)).

The Supreme Court has just recently applied the above standard to the very jury instruction at issue in this case. *See Buchanan*, — U.S. —, 118 S.Ct. 757, 139 L.Ed.2d 702. The precise issue advanced to the Supreme Court, in *Buchanan*, was whether the absence of a general instruction on the concept of mitigation, and of instructions on particular statutorily defined mitigating factors, violated the Eighth and Fourteenth Amendments to the United States Constitution. *Id.* Thus, the respondent, in this case, was technically correct in pointing out that the Supreme Court did not grant the petition for writ of certiorari on the precise questions at issue before this court.

However, in deciding whether the absence of the requested mitigation instructions violated Buchanan's rights under the Constitution, the Court focused on the instruction that was given to determine if that instruction satisfied the requirements under the constitution. *Id.* 118 S.Ct. at 762–63. The instruction that was given in Buchanan's trial is the same Virginia capital pattern sentencing instruction that was given in Week's trial.

The Supreme Court specifically held that the instruction did not violate any constitutional principles, and that it did not foreclose the jury's consideration of any mitigating evidence. *Buchanan*, — U.S. at —, 118 S.Ct. at 762. The Court further held, in pertinent part:

> The instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they "may fix" the penalty at death, but directed that if they believed that all the evidence justified a lesser sentence then they "shall" impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved.

Id. 118 S.Ct. at 762.[39] In addition, the Supreme Court denied the argument that

39. It should be noted that the precise question at issue in this case was not raised before the Supreme Court until oral argument in the *Buchanan* case. *Id.* 118 S.Ct. at 762 n. 4. At trial both Buchanan and the Commonwealth agreed that the court should instruct the jury with Virginia's pattern capital sentencing instruction, the same instruction given in this case. Although the defense had requested several additional jury instructions on particular mitigating factors, he did not object to the instruction given. The claim raised here was also never raised prior to oral argument in the Supreme Court proceedings. Accordingly, the precise claim raised here was clearly waived by Buchanan, as pointed out by the Supreme Court. *Id.* However, regardless of whether Buchanan had technically waived the issue, the Supreme Court did ultimately rule on the claim.

Eighth Amendment requires the court to instruct the jury on its obligation and authority to consider mitigating evidence. *Id.* 118 S.Ct. at 761.

Pursuant to the Supreme Court's holding in *Buchanan*, this court has no choice but to hold that the trial court did not err by giving the instruction in question to the jury. Furthermore, as the given instruction was sufficient under the Constitution, Weeks' proposed jury instruction was unnecessary. Thus, the trial court did not err by refusing the proposed instruction. For these reasons, petitioner has not shown that the decision of the Supreme Court of Virginia was contrary to, or an unreasonable application of, clearly established federal law. Accordingly, this court denies both claims.

N. Claim XXVIII

[54] Petitioner objects to the Magistrate Judge's conclusion that Claim XXVIII has no merit. This claim is closely related to, although different from, Claims XXVI and XXVII. In this claim, Weeks argues that when the jurors asked whether they could sentence Weeks to life in prison even if they find a statutory aggravating factor, the trial court erred by simply referring them to the jury instruction they had already been given. Weeks maintains that in the face of actual confusion by the jurors, the trial court had a duty to clarify its prior instruction.

> The jury question read as follows:
>
> If we believe that Lonnie Weeks, Jr., is guilty of at least one of the aggravating alternatives, then is it our duty as a jury to *issue* the death penalty? Or, must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty or one of the life sentences? What is the rule? Please clarify.

Over Weeks' objection, the trial judge responded by simply referring the jury to the instruction that had already been given to them, the same instruction discussed above in regard to Claims XXVI and XXVII. On appeal, the Supreme Court of Virginia held that this claim had no merit. *Weeks*, 450 S.E.2d at 390.[40]

The Magistrate Judge found that "[b]ecause this Court has already held that this jury instruction was constitutionally sufficient ... the trial judge did not err in referring the jury to the same instruction when the question arose." R & R at 109. The trial judge could have reasonably assumed that the jury members would understand their charge if their attention were brought to the specific instruction that governed their question. It is further reasonable to assume that if a second reading of the passage failed to clear up the jury's question, the jury would have issued another question. In this case, the jury did not issue any additional questions, which indicates that they understood the instruction and the governing law, once their attention was brought to the applicable instruction.

Accordingly, the petitioner has failed to show that the decision of the Supreme Court of Virginia was contrary to, or an unreasonable application of, federal law. Thus, this court finds that this claim is without merit.

O. Claim XXIX

To the extent that this claim consists of an argument that the trial judge misapplied Va. Code § 19.2-264.5, that portion of the claim is not reviewable here, as it is a question of state law. The other portion of the claim is that the trial judge erred by not imposing a sentence of life imprisonment because the jury clearly did not understand the law in selecting the appropriate sentence. Petitioner bases this claim on his argument that the Virginia pattern capital jury instruction was unconstitutional and that the jury indicated they did not understand the law. This claim has been adequately addressed in the two previous sections.

For the reasons stated previously, as well as the reasons stated in the Report and Recommendation, petitioner has not shown that the decision of the Supreme Court of

40. This is one of the miscellaneous jury instruction claims that was dismissed as meritless without any discussion by the Supreme Court of Virginia.

Virginia was contrary to, or an unreasonable application of, federal law. Accordingly, this court finds that this claim is without merit.

P. Claim XXXIV

Weeks objects to the Magistrate Judge's recommendation that Claim XXXIV is without merit. Claim XXXIV states that the imposition of the death penalty against Weeks was arbitrary and capricious and violated Weeks' rights under the constitution. According to petitioner, "the combination of errors which pervade Mr. Weeks' trial make the imposition arbitrary and capricious."

For the reasons stated in the Report and Recommendation, and based on this court's determination of the petitioner's various individual claims, the court finds that this claim is without merit.

Q. Recommendation on Certificate of Appealability

The Magistrate Judge recommended that this Court decline to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. Petitioner objects to this recommendation. Weeks first points out that he has not yet applied to the district court for a certificate of appealability as to any issue. He further maintains that, under 28 U.S.C. § 2253(c), unsuccessful habeas petitioners are required to request such certificates from the Court of Appeals, and not the District Courts.

Petitioner's second argument points out the dichotomy between the Fed.R.App.P. 22(b) and 28 U.S.C. § 2253(c) Rule 22(b) states, in pertinent part:

> In a habeas corpus proceeding in which the detention complained of arises out of process issued by State court, appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code.

However, 28 U.S.C. § 2253(c)(1) states, in pertinent part:

> Unless a *circuit justice or judge* issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .

(emphasis added).

Although both provisions were amended on April 24, 1996, pursuant to the AEDPA, the language of Rule 22(b) no longer tracks the language of § 2253. Prior to the changes, § 2253 provided that "an appeal may not be taken . . . *unless the judge who rendered the order in the habeas corpus proceeding*, or a circuit justice or judge, issues a certificate of probable cause." (emphasis added). The amendment in 1996 took out the reference to the district court judge who rendered the order. However, the only change made to Rule 22(b) was the replacement of the phrase "certificate of probable cause" with the phrase "certificate of appealability."

Although the Fourth Circuit has not yet addressed this issue, at least two Circuits have, concluding that Congress did intend for district court judges to have continued authority to issue certificates of appealability, under the Antiterrorism and Effective Death Penalty Act (AEDPA). *See, e.g., Houchin v. Zavaras*, 107 F.3d 1465 (10th Cir.1997); *Hunter v. United States*, 101 F.3d 1565, 1577–83 (11th Cir.1996). Both courts found that the word "circuit" in § 2253 only modifies "justice," and not "judge," which would in turn include both district judges and circuit judges. *Id.*

This court, however, declines to decide this issue, as it is not yet ripe. Until petitioner applies to this court for a certificate of appealability, this court will not determine whether it has the authority to issue such a certificate.

Conclusion

The court, having examined the objections to the Magistrate Judge's Report, and having reviewed the record and made *de novo* findings with respect to the portions objected to, does hereby ORDER that the petition be DENIED AND DISMISSED in its entirety, and that respondent's Motion for Summary Judgment be GRANTED.

The Clerk shall mail a copy of this order to counsel for petitioner and respondent.

It is so ORDERED.

MEMORANDUM OPINION AND ORDER

This matter is before the court on petitioner's motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. For the reasons set forth below, this motion is DENIED.

On April 1, 1998, this court issued its Opinion and Final Order in this case, granting respondent's motion for summary judgment and dismissing Weeks' petition for a writ of habeas corpus. On April 15, 1998, petitioner filed a motion to alter or amend judgment. Respondent responded in opposition to petitioner's motion on April 24, 1998. On May 1, 1998, petitioner filed a reply brief in support of his motion to alter or amend judgment.

According to petitioner, this court's Opinion and Final Order contains a factual error that prompted an incorrect determination of governing law, and which bears upon the court's resolution of the motion for summary judgment. Specifically, petitioner contends that this court committed a factual error in rejecting Claim VII of his federal habeas petition. He alternatively argues that this court committed a legal error in its application of Virginia law to the facts of this case.

Under Rule 59(e) of the Federal Rules of Civil Procedure, a district court may "rectify its own mistakes in the period immediately following the entry of judgment." *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982). The Fourth Circuit Court of Appeals has held that Rule 59(e) permits a court to amend a judgment for three reasons: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *Equal Employment Opportunity Comm'n v. Lockheed Martin Corp., Aero & Naval Systems*, 116 F.3d 110, 112 (4th Cir. 1997).

The court finds that there has been no error as to either the facts or the final decision to dismiss Weeks' petition. Accordingly, the court DENIES petitioner's motion to amend or alter the court's judgment. The court will, however, clarify its reasons for finding that Claim VII is without merit.

On June 7, 1993, petitioner filed his initial motion for a bill of particulars. The trial court denied the request. On October 1, 1993, Weeks filed a renewed motion for a bill of particulars, pursuant to the provisions of Virginia Code § 19.2-266.2. This renewed motion was filed simultaneously with two pre-trial motions to suppress evidence. The renewed motion specifically sought disclosure of particulars relevant to his suppression motions.

[55] Section 19.2-266.2 of the Virginia Code provides a deadline for filing motions or objections seeking the suppression of evidence or the dismissal of a warrant, information, or indictment. The statute also provides that "[t]o assist the defense in filing such motions or objections in a timely manner, the trial court shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2-230." Weeks made two distinct arguments supporting his claim that the trial court erred in denying his motions for a bill of particulars. Only one, however, is relevant to this motion to amend or alter judgment: that the mandatory nature of Va.Code § 19.2-266.2 creates a liberty interest in receiving a bill of particulars, the denial of which violated his due process rights under the federal Constitution.

In recommending that this claim is without merit, the Magistrate Judge found that Va. Code § 19.2-266.2 cannot be construed to provide an absolute right to a detailed bill of particulars in every case. This decision was based on the fact that the statute does not mandate that the bill of particulars contain every detail, or any particular details of the case, and if a defendant finds that a bill of particulars is inadequate, he must show "good cause" in order for the court to order supplementation. The Magistrate Judge concluded that the requirement of a bill of particulars is thus, in essence, in the discretion of the court.

There are additional reasons, however, for holding that the decision to order a bill of particulars is discretionary. Petitioner maintains that the Virginia cases cited by this court [1] only apply to requests made under Va.Code § 19.2-230, which has discretionary language, and not § 19.2-266.2. Section 19.2-230 provides that a court of record *may* direct the filing of a bill of particulars at any time before trial. However, the Supreme Court of Virginia has never held that a bill of particulars is mandatory when requested under § 19.2-266.2. In Weeks' case, the Supreme Court of Virginia found that the trial court had committed no error with respect to both requests for bills of particulars. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (1994).

Petitioner focuses on the word "shall" in § 19.2-266.2. The statute, though, also provides that a bill of particulars is to be directed "*pursuant to* § 19.2-230." There is no debate that a bill of particulars under § 19.2-230 is discretionary. Accordingly, it is reasonable to interpret § 19.2-266.2 as requiring a trial court to order a bill of particulars, if, in its discretion, the trial court finds it necessary to assist the defense in filing suppression motions.

[56] However, even if a trial court must order the government to file a bill of particulars in all cases in which one is requested pursuant to § 19.2-266.2, it is only a violation of state law not to do so. It is not the deprivation of a constitutional right, nor is it a violation of any federal law. There is no federal constitutional right to a bill of particulars. *United States v. Bales*, 813 F.2d 1289 (4th Cir.1987) (holding the granting of one is within the sound discretion of the trial judge).

Petitioner does not deny that there is no general constitutional right to a bill of particulars. He instead argues that the language of § 19.2-266.2 creates a liberty interest that is protected by the due process clause of the Fourteenth Amendment. According to petitioner, he had a vested right to receive a bill of particulars related to suppression "which cannot be deprived absent due process." Pet's Br. at 7. This claim is wholly without merit. Petitioner cites to no Supreme Court cases which support his argument that a state created right to a bill of particulars is the kind of "state-created liberty interest" protected by the Due Process Clause of the Fourteenth Amendment.

The cases relied on by petitioner, *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989), and *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983), pertain only to state-created liberty interests in the prison context. Moreover, both cases have been overruled in large part by a recent Supreme Court decision. *See Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). In *Sandin*, the Supreme Court held that while states may create liberty interests which are protected by the Due Process Clause, those interests will be generally limited to freedom from restraint that imposes atypical and significant hardships on the inmate in relation to the ordinary incidents of prison life. *Sandin*, 515 U.S. at 484, 115 S.Ct. 2293.[2] In addition, all of these cases deal with the question of when procedural due process is owed a prisoner.[3]

1. *See Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218 (1991) (holding that whether the Commonwealth is required to file a bill of particulars is a matter within the discretion of the trial court); *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227 (1991) (holding that when an indictment is sufficient to give the accused "notice of the nature and character of the offense charged so he can make his defense" a bill of particulars is not required).

2. Under prior case law, a prison inmate only had to point to mandatory language and substantive predicates, in a state statute or regulation pertaining to prisoners, to establish that the state created a constitutionally protected liberty interest. *See Hewitt v. Helms*, 459 U.S. 460, 470-72, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983).

3. There is no question that petitioner was afforded *procedural* due process, even assuming that the state statute creates a liberty interest, as he was afforded a hearing on the merits of his motion for a bill of particulars. Procedural due process simply ensures that government entities grant individuals the proper procedure, usually notice and an opportunity to be heard, before depriving them of a protected property or liberty interest. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). What petitioner seems to be arguing is that the state statute has created a liberty interest protected by *substantive* due process.

4. Moreover, even if the trial court was in error, petitioner cannot meet the *Brecht* harmless error standard. *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (holding that a petitioner is not entitled to habeas relief based on a trial error unless he can establish that it had a "substantial and injurious effect or influence in determining the jury's verdict"). A review of the record in this case makes clear that, even if the court erred, the error did not have a substantial and injurious effect on the trial process. This is particularly true because most of the requested particulars were within Weeks' own personal knowledge.

1. J.D. Netherland, the original respondent, is no longer the warden of the facility where Chichester is confined. S.V. Pruett is the current Warden.

For the above reasons, the Supreme Court of Virginia's decision regarding the requests for a bill of particulars was not "contrary to," nor did it involve "an unreasonable application of", clearly established federal law, as determined by the Supreme Court of the United States.[4] Accordingly, the court DENIES petitioner's motion to amend or alter judgment in this case.

The Clerk is DIRECTED to send a copy of this Memorandum Opinion and Order to counsel for petitioner and respondent.

It is so ORDERED.

Thomas Lee ROYAL, Jr., Petitioner,

v.

J.D. NETHERLAND, Warden [1], Respondent.

Civil Action No. 3:96CV956.

United States District Court, E.D. Virginia, Richmond Division.

May 5, 1998.

After his conviction for capital murder and sentence of death were affirmed on direct appeal, 250 Va. 110, 458 S.E.2d 575, and his state petition for writ of habeas corpus was dismissed, petitioner sought federal habeas corpus relief. Respondent moved to dismiss, and the District Court, Merhige, J., held that: (1) petition, which was filed after effective date of Antiterrorism and Effective Death Penalty Act (AEDPA) was governed by substantive changes to standards of review effected by ADEPA; (2) death sentence did not violate individualized sentencing procedures required by Federal Constitution; (3) counsel was not ineffective in failing to assert defenses based on intoxication, lack of intent, or claim that defendant was not "trigger-man"; (4) entry of guilty plea resulted in waiver of all defenses other than those that were jurisdictional; and (5) majority of claims asserted were procedurally defaulted.

Motion granted, and petition denied.

1. Habeas Corpus ⇐205

Federal habeas corpus petition which was filed after effective date of Antiterrorism and Effective Death Penalty Act (AEDPA) was governed by substantive changes to standards of review effected by ADEPA, even though petitioner contended that his state habeas corpus petition was pending on AEDPA's effective date, and that he went through state proceedings with assumption that he would enter federal habeas review under former standards. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⇐364, 366, 378

Claims asserted by federal habeas corpus petitioner whose state death sentence had been affirmed were "exhausted," so that merits of claims could potentially be addressed, where claims had either been presented to Virginia Supreme Court on direct appeal or on state habeas petition, or had not ever been presented to Supreme Court and could not now be presented because they were time-barred. 28 U.S.C.A. § 2254(b); Va.Code 1950, §§ 8.01-654, subd. B, par. 2, 8.01-654.1.

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450 S.E.2d 379
(Cite as: 248 Va. 460, 450 S.E.2d 379)

Lonnie WEEKS, Jr.,
v.
COMMONWEALTH of Virginia.

Record No. 940335.

Supreme Court of Virginia.

Nov. 4, 1994.

Defendant was convicted in the Circuit Court, Prince William County, Herman A. Whisenant, Jr., J., of grand larceny and firearms charges, and capital murder, and was sentenced to death. On automatic death penalty review, the Supreme Court, Compton, J., held that: (1) two-hour detention while defendant was being questioned by police officers occurred pursuant to defendant's consent and defendant's questioning after prior invocation of right to remain silent did not violate his Fifth Amendment rights; (2) trial court did not err in refusing to dismiss juror for cause; (3) victim impact testimony is relevant to punishment in capital murder prosecution; and (4) death sentence was appropriate under the circumstances.

Affirmed.

[1] CRIMINAL LAW k1134(3)
110k1134(3)
On review of death sentence, court considers not only trial errors enumerated by defendant but also whether sentence of death was imposed under influence of passion, prejudice, or any other arbitrary factor, and whether sentence is excessive or disproportionate to penalty imposed in similar cases. Code 1950, § 17-110.1, subd. A.

[2] CRIMINAL LAW k1130(5)
110k1130(5)
Supreme Court would not consider assigned errors which defendant had not briefed or argued.

[3] CRIMINAL LAW k412(4)
110k412(4)
Defendant's two-hour detention while being questioned by police officers did not violate Fourth Amendment; defendant consented to detention and generally agreed to cooperate with police, he consented to initial "pat down," acquiesced to questioning, accepted invitation to enter police car, agreed not to go to service station for food and drink, acquiesced to second and third "pat down" of trouser pockets and agreed to be interviewed alone in motel room by officer. U.S.C.A. Const.Amend. 4.

[4] CRIMINAL LAW k412.1(1)
110k412.1(1)
Defendant's prior election to remain silent was scrupulously honored and thus statements to police officer were admissible; defendant was carefully advised before initial interview of his right to remain silent and there was immediate cessation of interview when defendant exercised right to silence, ten hours had passed between first and second interviews during which time defendant confessed and even though fresh set of Miranda warnings was not given before second interview, defendant responded affirmatively when asked whether he remembered "rights" read to him earlier, and he readily and freely discussed matter with investigator and did not revoke valid waiver. U.S.C.A. Const.Amend. 5.

[5] CRIMINAL LAW k412.1(4)
110k412.1(4)
In determining whether continued questioning is appropriate after initial refusal to answer questions, factors include whether defendant was carefully advised before initial interrogation that he was under no obligation to answer any questions and could remain silent if he wished, whether there was immediate cessation of initial interrogation and no attempt to persuade defendant to reconsider position, whether police resumed questioning only after passage of significant period of time, whether Miranda warnings preceded second questioning, and whether second interrogation was limited to crime that had not been subject of earlier interrogation. U.S.C.A. Const.Amend. 5.

[6] CRIMINAL LAW k412.1(4)
110k412.1(4)
Mere fact that second interview, after defendant's prior election to remain silent, involves some of same subject matter discussed during initial interview did not render confession constitutionally invalid; defendant was advised of new facts that had been developed by investigators and there was no effort to persuade defendant against his will after he initially invoked right to silence by repeating questions about same subject matter covered earlier. U.S.C.A. Const.Amend. 5.

[7] CRIMINAL LAW k627.6(6)
110k627.6(6)
Denial of defendant's motion seeking copies of any criminal records pertaining to himself, codefendant and probable witnesses who were nonresidents did not prejudice defendant's right to fairly depend himself; many of those named in motion did not testify at trial, and trial court had already ordered prosecutor to furnish defendant before trial with criminal history information concerning any witness to be called by prosecutor at any hearing in or trial of case. Code 1950, § 19.2-389.

[8] CRIMINAL LAW k897(1)
110k897(1)
Defendant procedurally defaulted on issue trial court's ruling on motion for scientific investigation; trial court never denied motion but instead stated it would entertain motion later upon defense showing that defendant had unsuccessfully sought results of testing that should probably already had been conducted by division of forensic sciences, and defense counsel did not object to ruling but instead withdrew motion as not being timely. Sup.Ct.Rules, Rule 5:25.

[9] COSTS k302.2(2)
102k302.2(2)
Defendant charged with capital murder is not entitled to ex parte hearing on his motion for expert assistance.

[10] INDICTMENT AND INFORMATION k121.1(7)
210k121.1(7)
Where no challenge was made to sufficiency of indictment, bill of particulars was not required.

[11] JURY k131(13)
230k131(13)
Defendant has no right to individual voir dire.

[12] JURY k131(15.1)
230k131(15.1)
Trial court did not abuse its discretion in disallowing questions during voir dire because questions were improper, vague, argumentative or nonspecific.

[13] JURY k131(8)
230k131(8)
In capital murder case involving white victim and black accused, trial court did not abuse its discretion in manner in which it questioned prospective jurors on subject of potential racial bias.

[14] CRIMINAL LAW k1158(3)
110k1158(3)
On appellate review, Supreme Court must give deference to trial court's decision whether to exclude or retain prospective juror because trial court "sees and hears the juror"; trial court's decision will be disturbed only upon showing of manifest error.

[15] JURY k97(2)
230k97(2)
In case in which defendant was accused of fatally shooting police officer, trial court did not commit manifest error in refusing to dismiss for cause juror who answered "I think so" in response to question as to whether he could be fair and impartial and set aside anything he might have heard in the past and be fair to both Commonwealth and accused, despite fact that juror had relative who was police officer and killed in the line of duty.

[16] CRIMINAL LAW k1043(2)
110k1043(2)
Defendant could not challenge on appeal admissibility of victim impact evidence by nonfamily members closely associated with victim where objection at trial did not distinguish between testimony by family members and testimony from other sources. Sup.Ct.Rules, Rule 5:25.

[17] CRIMINAL LAW k1208.1(6)
110k1208.1(6)
Victim impact testimony is relevant to punishment in capital murder prosecution in Virginia.

[18] CRIMINAL LAW k419(3)
110k419(3)
Hearsay rule does not operate to exclude evidence of statement offered for mere purpose of explaining conduct of person to whom it was made, particularly when evidence was not offered for purpose of establishing guilt or innocence of accused but for purpose of showing reason for police officer's action in arresting him.

[19] CRIMINAL LAW k419(3)
110k419(3)
Police officer's statement that codefendant had stated to another investigator that defendant "did in fact shoot the trooper," was not inadmissible hearsay where statement was offered to explain officer's action in arresting defendant 12 minutes after defendant was considered not to be in custody, rather than to prove that defendant had in fact shot trooper.

[20] HOMICIDE k269
203k269
Whether defendant is guilty of premeditated killing of victim is usually a jury question.

[21] HOMICIDE k14(2)
203k14(2)
Intention to kill need not exist for any specified length of time prior to actual killing; design to kill may be formed only a moment before fatal act is committed provided the accused had time to think and did intend to kill.

[22] HOMICIDE k156(1)
203k156(1)
In deciding premeditation element of capital murder, jury may consider among other things brutality of attack and whether more than one shot was fired.

[23] HOMICIDE k232
203k232
Evidence supported element of premeditation required for offense of capital murder; defendant was on probation, riding in stolen vehicle and possessing weapon shown to have been used in previous murder, defendant shot trooper at virtually point-blank range at least six times in order to avoid arrest, and location of bullet wounds indicated that trooper may have been fired upon while lying on pavement.

[24] HOMICIDE k357(11)
203k357(11)
Defendant's conduct in committing offense involved depravity of mind and or aggravated battery as required for "vileness" predicate for death sentence; record supported conclusion that death sentence was appropriate for defendant convicted of shooting of trooper six times from close range with high-powered revolver, two shots being independently fatal, officer posed no threat to defendant in connection with routine traffic stop, trooper died with service revolver still in holster, and defendant left and returned to scene, falsely claiming he attempted to render assistance to victim when real purpose was to retrieve incriminating evidence.

[25] HOMICIDE k357(8)
203k357(8)
Imposition of death sentence for defendant who repeatedly shot trooper at close range in attempt to avoid arrest was not excessive or disproportionate to offense considering punishment generally imposed for similar conduct. Code 1950, § 17-110.1, subd. C, par. 2.

****382** William J. Baker, Daniel J. Morissette, Manassas (DePolo & Morissette, on brief), for appellant.

Robert H. Anderson, III, Asst. Atty. Gen. (James S. Gilmore, III, Atty. Gen., on brief), for appellee.

Present: All the Justices.

COMPTON, Justice.

On February 24, 1993, Virginia State Trooper Jose M. Cavazos was shot and killed by defendant Lonnie Weeks, Jr., in Prince William County. Subsequently, defendant was indicted for the felonious, willful, deliberate, and premeditated homicide of the law enforcement officer, when such killing was for the purpose of interfering with the performance of the trooper's official duties.- Code § 18.2-31(6). Defendant also was charged with grand larceny of a motor vehicle, Code § 18.2-95, and use of a firearm in the commission of murder, Code § 18.2-53.1.

Following several pretrial hearings, including a hearing on defendant's motion to suppress his confession, defendant was tried by a single jury during five days in October 1993. As the trial began, defendant pled guilty to the grand larceny and firearm charges. The court subsequently sentenced defendant to imprisonment for ten-year and three-year terms respectively on those charges.

The jury found the defendant guilty of the capital murder charge and, during the second phase of the bifurcated capital proceeding, the jury fixed the defendant's punishment at death for the capital offense based upon the vileness predicate of the capital murder sentencing statute. Code § 19.2-264.4.

Later, the trial court considered a probation officer's report and heard testimony from the officer relevant to punishment. The court then sentenced the defendant to death for the capital murder.

[1] The death sentence is before us for automatic review under Code § 17- 110.1(A), see Rule 5:22. As required by statute, we will consider not only the trial errors enumerated by the defendant but also whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. Code § 17-110.1(C).

There is no conflict about any relevant fact in the case. In early February 1993, defendant, who was age 20, a North Carolina resident, and on probation for a 1992 drug conviction, participated in the burglary of a residence in the Fayetteville, North Carolina area. During the course of that crime, defendant obtained a set of keys to a 1987 Volkswagen Jetta automobile parked at the residence, and stole the vehicle. Later that month, defendant drove the vehicle to Washington, D.C., intending to sell it or trade it for drugs. Defendant carried in the vehicle a Glock Model 17, nine millimeter, semi- automatic pistol loaded with hollow-point bullets. According to the testimony, the bullets were designed for police use, not target practice or hunting; this type of bullet is referred to as a "man-stopper."

During the late evening of February 23, defendant was riding as a passenger in the vehicle being driven by his uncle, 21-year-old Lewis J. Dukes, Jr., a resident of the District of Columbia. The pair was travelling

**383 en route from Washington to Richmond southbound on Interstate Route 95.

Around midnight, Trooper Cavazos was operating radar from his marked police vehicle parked in the highway medium monitoring southbound traffic. The Volkswagen driven by Dukes passed the trooper's position at a high rate of speed. The officer activated his vehicle's emergency lights and proceeded to chase the vehicle occupied by defendant. After travelling a brief distance, and passing other vehicles by driving on the right shoulder of the highway, Dukes brought the car to a stop on the Dale City exit ramp, in a dark, remote area.

The trooper pulled his patrol car to a stop behind the Volkswagen, which he approached on foot on the driver's side. Upon the officer's request, Dukes alighted and was standing toward the left rear of the Volkswagen when the trooper asked defendant to step out of the vehicle.

Defendant complied with the officer's request and alighted on the right side of the vehicle as the trooper was near the left side. As defendant left the vehicle he was carrying the fully loaded pistol. He then fired at least six bullets at the officer, two of which entered his body beside the right and left shoulder straps of the protective vest the trooper was wearing. The officer was immediately rendered unconscious and fell to the pavement, dying within minutes at the scene with his police weapon in its "snapped" holster.

Defendant, with Dukes as a passenger, then drove the Volkswagen from the scene and parked it on the lot of a nearby service station. Defendant returned to the scene of the crime on foot and retrieved Dukes' District of Columbia driver's license that had been dropped on the pavement. Defendant rejoined Dukes, and they were found by police shortly thereafter in the parking lot of a nearby motel.

[2] On appeal, defendant assigns 47 alleged errors committed by the trial court. The defendant has not briefed or argued ten of those assigned errors (Nos. 4, 5, 6, 7, 8, 17, 26, 31, 38, and 39); hence we will not consider them. Jenkins v. Commonwealth, 244 Va. 445, 451, 423 S.E.2d 360, 364 (1992), cert. denied, 507 U.S. 1036, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993). In addition, defendant effectively presents no argument in support of five of those alleged errors (Nos. 16, 34, 44, 45, and 46). Typical of the argument in support of those five is the following conclusional statement on brief in support of No. 45: "This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia." We have considered these so-called arguments and find no merit in any of the five.

The remaining assignments of error emphasized by defendant present questions dealing with defendant's detention before his arrest, his confession, requests for a scientific investigation and expert assistance in the fields of ballistics and pathology, the seating of one juror who was challenged for cause, and use during the trial's penalty phase of victim impact evidence.

First, defendant contends that he was detained for approximately two hours before he was arrested and that this constituted an illegal arrest without probable cause. Because the arrest was illegal, defendant argues, the trial court erred by admitting in evidence defendant's statements to police that were the product of the illegal arrest.

The facts relevant to this issue were presented both at a pretrial suppression hearing and during the trial. The evidence showed that Prince William County police officer James C. Virgil, Jr., was dispatched to the scene of the crime about 12:53 a.m. on February 24, and began searching the immediate area for possible suspects. Shortly, Virgil saw defendant and Dukes walking in the rear parking lot of the motel located about one-half mile from the scene. The men, who were walking close together toward Virgil's marked police car, "turned back around and started to walk away" from the car. Then the pair "started to split apart. One subject was going to the left and one going to the right." When the officer was 15-20 feet from them with the vehicle's headlights and spotlight operating, he stopped the vehicle

**384 and began to step from the car. At that point, the men "immediately" threw "both their hands up in the air" and one said "Don't shoot." Virgil then said, "Police. Don't move. Can I talk to you all?"

Virgil approached the men and said, "Is it okay if I pat you down for my safety?" Defendant said "go ahead." Virgil felt the outside of their clothing and seized nothing from either man. At the time Virgil noticed that defendant "was breathing heavily and was sweating profusely." Defendant was wearing a plaid shirt, blue jeans, and no jacket in 29-degree weather. The officer began asking "just basic casual talking questions." The men produced identification with defendant showing a North Carolina driver's license.

When the officer asked, "What are you all doing here?" defendant said they had been "dropped off" at the motel parking lot by a relative several hours earlier to await "two girls from Washington, D.C." While there, defendant said, "We heard the shots." Virgil asked, "What shots?" Without directly responding to that question, defendant stated that he ran "to where the shots came from" and saw a State Trooper on the ground who had been shot. Defendant said that he "ran over to the trooper and he rolled the trooper over to help him." Defendant stated that as other police officers arrived at the scene, he returned to the motel parking lot.

Virgil then asked defendant if the pair "would mind" remaining at the motel to await an investigator to interview them, inasmuch as they were the only persons who had heard the shots and defendant had been to the scene. Defendant agreed, stating "that's fine."

In a few minutes, Prince William County police officer Lyle Denny arrived to assist Virgil. Denny made "a pat down" of defendant and removed from defendant's left trouser pocket "a group of Volkswagen keys." After examining the keys, Denny returned the keys to the pocket.

Because of the cold weather and the fact that defendant was not wearing a jacket or sweater, Virgil asked the pair whether they would like to sit in his police car. Defendant replied, "I thought you'd never ask. Sure." The two men entered the back seat of the vehicle. Even though the pair could not open the rear doors from the inside, they did not ask to get out. They were not restrained with handcuffs or similar devices. A plastic barrier separating the front and rear parts of the vehicle was in the "down" position, enabling them to speak easily with Virgil when he was in the front seat.

A short while later, upon defendant's request, he was taken to the motel and permitted to make two telephone calls. After making the calls, defendant asked "if he could go get some food and something to drink up at" the service station. About the same time, Virgil learned from the police radio that county officers had located "a suspicious vehicle" at the service station, about 75 yards from the motel lot. Virgil responded to Weeks' request with, "Do you mind holding off right now? ... I can't let you do that right now, if that's okay with you." Defendant said, "Fine."

A few seconds later, Virgil learned from another radio transmission that the "suspicious" vehicle was a Volkswagen bearing North Carolina license plates. Recalling that defendant had Volkswagen keys in his pocket and carried a North Carolina operator's license, Denny asked defendant, who was inside the police vehicle, "where the keys that were in his pocket were." Defendant responded, "What keys?" The officer asked defendant to step out of the vehicle and "patted" defendant's pants pockets, finding no keys. Then the rear seat of the vehicle was lifted, and the keys were found directly under where defendant had been sitting. When the officer showed the keys to defendant, he said, "Those aren't my keys."

About 2:45 a.m., after defendant had been with Officer Virgil for about two hours, state police officers arrived to question defendant and Dukes. Near 3:00 a.m., state police Special Agent J.K. Rowland met defendant in the motel lobby. Rowland "explained to him that he was not under arrest" and asked defendant "if he would like to talk ... about what he had seen up on Interstate 95." Defendant, who Rowland testified was "free to leave at that time," conducted an interview

**385 with defendant in private in one of the motel rooms.

[3] We do not agree with defendant's contention that his two-hour detention while being questioned by Officers Virgil and Denny violated his Fourth Amendment rights under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its progeny. Terry is not implicated here because, as the trial court found from the undisputed facts, defendant consented to the detention and generally agreed to cooperate with the police. Just as a defendant may consent to a search, he may also consent to what would otherwise amount to a seizure of his person. Limonja v. Commonwealth, 8 Va.App. 532, 539-41, 383 S.E.2d 476, 480-82 (1989), cert. denied, 495 U.S. 905, 110 S.Ct. 1925, 109 L.Ed.2d 288 (1990).

At every step in the questioning during the whole two-hour period, the defendant readily agreed to the detention. He consented to the initial "pat down," acquiesced to questioning, accepted the invitation to enter the police car, agreed not to go to the service station for food and drink, acquiesced to a second and third "pat down" of his trouser pockets, and agreed to be interviewed alone in the motel room by Rowland. "The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation." Florida v. Bostick, 501 U.S. 429, 439, 111 S.Ct. 2382, 2389, 115 L.Ed.2d 389 (1991).

[4] Next, defendant contends that the trial court erred in denying his motion to suppress the confession made to Special Agent Rowland because the authorities failed to scrupulously honor his request to remain silent.

The facts relevant to this issue show that as Rowland questioned defendant in the motel room, Rowland became "more and more suspicious" of defendant. Even though defendant "was free to leave" at that point, Rowland advised defendant of his constitutional rights according to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as a precaution at 7:40 a.m. Defendant then exercised his right to remain silent and wrote, "Do not want to discuss case any further," on the "Advice of Rights" form that he signed. Rowland honored this request, and ceased questioning.

At 7:50 a.m., Rowland was advised by another investigator that Dukes had just stated that defendant shot the trooper. Rowland arrested defendant at 7:52 a.m.

Subsequently, defendant was taken before a magistrate and then to the Adult Detention Center in Manassas. Later that morning, classification officers in the jail routinely questioned defendant about his physical and mental state; no attempt was made to elicit information about the crime. During the interview, defendant indicated he was considering suicide because he had shot the trooper. Defendant also voluntarily wrote a letter to a jail official admitting the killing and expressing remorse. Defendant does not contest either of these admissions but attacks the constitutional validity of the following interview.

Near 6:00 p.m. on February 24, defendant was brought to the lounge of the local prosecutor's office where Rowland again interviewed him; additional information had been developed by the police during the day between the termination of the first interview and the beginning of this second interview. Rowland asked defendant, "Do you remember the rights I read to you earlier today?" to which defendant responded affirmatively. Rowland proceeded "to summarize the investigation through the course of the day's events to that point in time."

Among other things, Rowland told defendant that an eyewitness to the shooting had made a positive identification of him as the assailant. A witness actually had identified defendant as a person she saw at the scene after the homicide, but she had not witnessed the shooting. At the conclusion of Rowland's summary, he said to defendant, "This is your opportunity to provide your explanation as to what happened at the shooting scene." Defendant responded, "Yes, I was packing." The officer knew that "packing" meant "carrying a firearm."

The defendant then confessed to the trooper's murder. Defendant stated that when the trooper asked him to get out of the

**386 Volkswagen, he picked up the pistol and "thought about throwing it away." Instead, he saw the trooper put his hand down toward his service revolver. Defendant said he then "panicked" and shot the victim "several times rapidly." Defendant stated that he drove, with Dukes as a passenger, to the service station, placing the pistol under the front floor mat of the Volkswagen. This interview lasted about one hour during which defendant readily answered questions and did not invoke his right to remain silent or any other constitutional right.

In support of his attack on the validity of the confession, defendant notes that he made no request to speak with the police after he exercised his right to silence at 7:40 a.m. Instead, he points out, he was held in jail and transported to the prosecutor's office about ten hours later. He notes that at the time of the interview he was restrained in handcuffs and leg irons, being questioned by the same officer to whom he previously indicated a desire to remain silent. Defendant also points out that he was not "read his rights" again, merely "asked if he understood the rights read to him previously." Thus, defendant contends, the confession later introduced at trial violated his constitutional rights. We do not agree.

In Miranda, the Supreme Court stated that, once the required warnings have been given a person before a custodial interrogation, the interrogation must cease if the individual, "at any time prior to or during questioning," expresses a desire to remain silent. 384 U.S. at 474, 86 S.Ct. at 1627. At this point, the Court said, the individual has shown an intention "to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." Id.

Subsequently, in discussing the scope of the foregoing Miranda passage, the Supreme Court said: "Clearly, therefore, neither this passage nor any other passage in the Miranda opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." Michigan v. Mosley, 423 U.S. 96, 102-03, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). The Court held "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.' " Id. at 104, 96 S.Ct. at 326. Accord Lamb v. Commonwealth, 217 Va. 307, 312, 227 S.E.2d 737, 741 (1976).

We will assume Rowland's preliminary comments at the second interview giving defendant the "opportunity" to explain his part in the crime amounted to an "interrogation." The question thus becomes whether defendant's prior election to remain silent was "scrupulously honored." We hold that it was.

[5] Suggesting a case-by-case approach to determine that continued questioning was appropriate after an initial refusal to answer questions, the Mosley court mentioned five factors that related to the evidence in that case. First, whether defendant "was carefully advised" before the initial interrogation "that he was under no obligation to answer any questions and could remain silent if he wished." Id. at 104, 96 S.Ct. at 327. Second, whether there was an immediate cessation of the initial interrogation, and no attempt to persuade defendant to reconsider his position. Id. Third, whether the police resumed questioning "only after the passage of a significant period of time." Id. at 106, 96 S.Ct. at 327. Fourth, whether Miranda warnings preceded the second questioning. Id. at 104, 96 S.Ct. at 326-27. Fifth, whether the second interrogation was limited to a crime that had not been the subject of the earlier interrogation. Id.

Clearly, when those factors are applied to the present case, no violation of defendant's Fifth Amendment rights occurred. Defendant was carefully advised before the initial interview of his right to remain silent, and there was immediate cessation of that interview when defendant exercised his right to silence. Moreover, ten hours, "a significant period of time," had passed between the first and second interviews, during which time defendant had confessed to the classification officers.

**387 Furthermore, even though a fresh set of Miranda warnings was not given before the second interview as was the case in Mosley, defendant responded affirmatively when asked whether he remembered the "rights" that were read to him "earlier today." He then readily and without hesitation freely discussed the matter with the investigator and did not revoke his valid waiver. Under these circumstances, the initial waiver is presumed to continue and the failure to offer defendant a new set of warnings does not render the second interview unconstitutional. See North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979); Washington v. Commonwealth, 228 Va. 535, 548, 323 S.E.2d 577, 586 (1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

[6] Finally, the mere fact that the second interview involved some of the same subject matter discussed during the initial interview does not render the confession constitutionally invalid. United States v. House, 939 F.2d 659, 662 (8th Cir.1991). Defendant was advised of the new facts that had been developed by the investigators, and there was no effort to persuade defendant against his will after he initially invoked his right to silence by repeating questions about the same subject matter covered earlier. Hence, there was no violation of Miranda under that prong of Mosley as a result of the reinterrogation. See Jackson v. Wyrick, 730 F.2d 1177, 1180 (8th Cir.), cert. denied, 469 U.S. 849, 105 S.Ct. 167, 83 L.Ed.2d 102 (1984).

Next, the defendant complains about the denial of two pretrial motions, which defendant wished to be considered by the court ex parte out of the prosecutor's presence.

[7] First, defendant filed a paper entitled "Ex Parte Motion for Disclosure of Records Maintained by the Central Criminal Records Exchange." In the motion, defendant sought copies of any criminal records pertaining to a number of individuals, including himself and Dukes, and certain North Carolina residents likely to be called as witnesses by the prosecutor. Over defendant's objection, the trial court permitted the prosecutor to attend the hearing on the motion and to argue against granting it. Following the hearing, the court denied the motion.

Code § 19.2-389 is codified among the statutes dealing with the duties and authority of the Exchange (CCRE), a separate division within the Department of State Police and, with a few exceptions, "the sole criminal record-keeping agency of the Commonwealth." Code § 19.2-387(A). Section 19.2-389 provides, in part, that upon "an ex parte motion of a defendant in a felony case and upon the showing that the records requested may be relevant to such case, the court shall enter an order" requiring the CCRE to furnish the defendant copies of any records of persons designated in the order on whom a report has been made to the CCRE. The statute is silent about the nature of any hearing on such motion.

We will assume, but not decide, that the statute is applicable to discovery in felony cases, that the defendant is entitled to be heard ex parte, and that the trial court erred in denying his motion under the statute. Nevertheless, we hold that the court did not commit reversible error because nothing in the record suggests that the trial court's rulings prejudiced defendant's right to fairly defend himself. See George v. Commonwealth, 242 Va. 264, 281, 411 S.E.2d 12, 23 (1991), cert. denied, 503 U.S. 973, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992).

Many of the persons named in the motion, including Dukes, did not testify at trial. In addition, the trial court had already ordered the prosecutor to furnish defendant before trial criminal history information concerning any witness to be called by the prosecutor "at any hearing in or trial of this case." Therefore, the "ex parte motion" was redundant.

[8] Second, defendant filed a paper labelled "Motion For Scientific Investigation, Ex Parte." Relying upon Code § 2.1-434.11, defendant moved the court to order a scientific investigation into certain factors surrounding the victim's death, including whether death was instantaneous as a result of the fatal wounds.

Code § 2.1-434.11 is codified among the statutes establishing a Division of Forensic

**388 Science within the State Department of General Services. That statute authorizes an attorney for an accused to request a scientific investigation, if the attorney believes in good faith that such investigation may be relevant to the criminal charge. The statute provides that the "motion shall be heard ex parte" and, if satisfied as to the correctness of the attorney's representation, the court shall order the investigation to be performed by the Division.

We do not reach the merits of the defendant's complaint because the issue has been procedurally defaulted. The trial court never denied the motion. At the hearing on the motion, with the prosecutor present, the trial court said that it would entertain the motion later upon defendant's showing that he had unsuccessfully sought the results of such testing that probably already had been conducted by the Division. Defense counsel did not object to this ruling; instead, he withdrew the motion as being not "timely." Because defendant acquiesced in the trial court's ruling, he may not challenge it on appeal. Rule 5:25.

Associated with defendant's claim of error relating to the request for a scientific investigation is the complaint that the trial court erred by denying his request to be heard ex parte on his motion for expert assistance in the fields of pathology and ballistics, and for denial of the request for appointment of such experts. Defendant asked that his motion for funding for expert assistance "be treated under the same procedure as required by Title 18 USC 3006A(e) in Federal Court." There is no merit to this contention.

[9] We already have decided that a defendant charged with capital murder is not entitled to an ex parte hearing on his motion for expert assistance. Ramdass v. Commonwealth, 246 Va. 413, 422, 437 S.E.2d 566, 571 (1993), rev'd on other grounds sub nom. Ramdass v. Virginia, --- U.S. ---, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). In addition, we specifically have refused to apply the federal statute to state capital murder prosecutions. Id.

[10] Before moving to the last two issues emphasized by defendant, we will comment on other matters raised before trial that are the subject of assignments of error. These issues warrant only a brief discussion because none of them has merit. Defendant raises related arguments regarding the trial court's partial denial of motions for bills of particulars. No challenge was made to the sufficiency of the indictment; thus, a bill of particulars was not required. Strickler v. Commonwealth, 241 Va. 482, 490, 404 S.E.2d 227, 232- 33, cert. denied, 503 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991). Defendant has procedurally defaulted a contention that we repeatedly have rejected, that is, that Virginia's capital murder and death penalty statutes are constitutionally infirm. In support of that contention, defendant impermissibly incorporates by reference a memorandum filed on the subject in the trial court. Jenkins, 244 Va. at 461, 423 S.E.2d at 370 (defendant has obligation to state clearly to appellate court grounds for assertion trial court's ruling erroneous; cross-reference to arguments presented at trial insufficient).

[11][12][13] Next, defendant raises several issues dealing with juror voir dire. He contends the trial court erred in denying individual voir dire and in refusing to allow a number of questions that he submitted to be asked of the prospective jurors. A defendant has no right to individual voir dire. Stewart v. Commonwealth, 245 Va. 222, 229, 427 S.E.2d 394, 399, cert. denied, 510 U.S. 848, 114 S.Ct. 143, 126 L.Ed.2d 105 (1993). Also, the trial court did not abuse its discretion in disallowing the questions because they were either improper, vague, argumentative, or nonspecific. Buchanan v. Commonwealth, 238 Va. 389, 402, 384 S.E.2d 757, 765 (1989), cert. denied, 493 U.S. 1063, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990). And, contrary to defendant's argument, the trial court did not abuse its discretion, in this case of a white victim and a black accused, in the manner which it questioned the prospective jurors on the subject of potential racial bias. See Turner v. Murray, 476 U.S. 28, 37, 106 S.Ct. 1683, 1688-89, 90 L.Ed.2d 27 (1986) (trial judge retains discretion as to form and number of questions on issue of racial bias when capital murder defendant accused of interracial crime).

**389 Also, defendant argues the trial court erred in denying his challenge for cause of juror Frederick Pama. Responding to the question whether he knew personally anyone who was the victim of a violent crime, Pama said, "About three years ago ... my wife's first cousin, who was very close to us, got killed. He was a police officer, from a drug shootout, and that affects me."

Pama initially had answered many questions by the trial court and counsel which reflected his ability to serve as an impartial juror. After he answered the foregoing question, he responded to questions by the prosecutor and said he could set aside any opinion he had formed about the case and could render a decision based solely on the law, and evidence produced at trial. Finally, when asked again by the prosecutor whether he "could be fair and impartial and set aside anything" he may have heard in the past and whether he could "be fair in this matter, both to the Commonwealth and to the accused," Pama answered, "I think so."

When denying defendant's motion to strike Pama, the trial court stated that "the proposed juror did not say that it would have an impact. He said, the way I understood his answer, he was not certain if it would have an impact, but at this time it would not."

[14] Upon appellate review, we must give deference to the trial court's decision whether to exclude or retain a prospective juror because the trial court "sees and hears the juror;" accordingly, the trial court's decision will be disturbed only upon a showing of manifest error. Eaton v. Commonwealth, 240 Va. 236, 246, 397 S.E.2d 385, 391 (1990), cert. denied, 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991) (quoting Wainwright v. Witt, 469 U.S. 412, 426, 105 S.Ct. 844, 853, 83 L.Ed.2d 841 (1985)). Accord George, 242 Va. at 276, 411 S.E.2d at 19 (juror not automatically disqualified on account of fact son had served as pallbearer at victim's funeral).

[15] We find no manifest error in the court's refusal to dismiss Pama for cause. From a review of Pama's entire voir dire, we conclude that the trial court was justified in finding that Pama could be impartial during the trial. Our duty to defer to the trial judge on this subject is illustrated by Pama's final answer, "I think so," which the trial judge, not this Court, heard. The juror's emphasis on "so" in that answer conveys an entirely different meaning than if the emphasis had been on "think." On appeal, we must presume he emphasized "so."

Finally, defendant contends the trial court erred in admitting "victim impact testimony" during the penalty phase of the trial. The victim's widow, as well as state troopers who worked with the deceased, testified about the profound effect the killing had on his surviving family and those with whom he worked.

[16] On appeal, defendant mounts a two-prong argument: so-called "victim impact evidence" is not relevant in Virginia to the jury's sentencing decision in a capital case, and, even if it is, the evidence should be limited to the effect upon family members only and not to the effect upon nonfamily members closely associated with the victim. We will not address the latter contention because, in the trial court, the defendant did not distinguish between testimony by family members and testimony from other sources. Therefore, the defendant may not challenge on appeal the admissibility of the troopers' testimony. Rule 5:25.

[17] Addressing the former contention, we hold that victim impact testimony is relevant to punishment in a capital murder prosecution in Virginia, and that the trial court did not err in admitting the testimony in this case. In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the Supreme Court authorized the use of such testimony. The Court said: "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." Id. at 827, 111 S.Ct. at 2609.

Defendant's reliance on Dingus v. Commonwealth, 153 Va. 846, 149 S.E. 414 (1929), is misplaced. There, in a unitary criminal trial, this Court held improper a prosecutor's argument alluding to the impact of the murder on the victim's widow, because it "in no way assists in determining either the guilt or

**390 the innocence of the accused." 153 Va. at 850, 149 S.E. at 415. In contrast, under Virginia's modern, bifurcated capital procedure,. victim impact evidence is probative, for example, of the depravity of mind component of the vileness predicate, which the jury in this case found as a basis for imposing the death penalty. As the Supreme Court said in Payne, "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." 501 U.S. at 825, 111 S.Ct. at 2608.

In conclusion, defendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. We have considered all the arguments in support of those issues and conclude that none has any merit. Only two of those issues warrant further discussion. First, defendant claims the trial court erred in permitting Special Agent Rowland to testify that Dukes had stated to another investigator "that Lonnie Weeks did, in fact, shoot the trooper." At trial, defendant objected to the statement specifically cn the ground that it was inadmissible hearsay and generally on constitutional grounds.

[18][19] The hearsay rule does not operate to exclude evidence of a statement offered for the mere purpose of explaining the conduct of the person to whom it was made; this is especially true when the evidence is not offered for the purpose of establishing guilt or innocence of the accused "but for the purpose of showing the reason for the police officers' action in arresting him." Upchurch v. Commonwealth, 220 Va. 408, 410, 258 S.E.2d 506, 508 (1979). See Manetta v. Commonwealth, 231 Va. 123, 127-28, 340 S.E.2d 828, 830 (1986). As the prosecutor argued, and the trial court implicitly found, this statement was offered to explain Rowland's action in arresting defendant at 7:52 a.m. after considering defendant not in custody 12 minutes earlier, and not to prove that defendant had in fact shot the trooper. Thus, the trial court did not err in admitting the statement.

[20][21][22] Second, defendant contends the trial court erred in denying his motion to strike the Commonwealth's evidence on the offense of capital murder made on the ground that the evidence was insufficient to prove the element of premeditation. The question whether a defendant is guilty of a premeditated killing of the victim is usually a jury question. The intention to kill need not exist for any specified length of time prior to the actual killing; the design to kill may be formed only a moment before the fatal act is committed provided the accused had time to think and did intend to kill. Clozza v. Commonwealth, 228 Va. 124, 134, 321 S.E.2d 273, 279 (1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985). In deciding the question, the jury may consider, among other things, the brutality of the attack and whether more than one shot was fired. Id.

[23] In the present case, the jury's finding on this element was fully supported by the evidence, and the trial court did not err in denying the motion to strike. On probation, riding in a stolen vehicle, and possessing a weapon that the evidence showed had been used in a previous North Carolina murder, defendant shot the trooper at virtually point-blank range at least six times to avoid arrest. Several of the bullet wounds, according to the evidence, probably were the result of ricochet, indicating that the trooper may have been fired upon while lying on the pavement. These and other factors surrounding the killing amply proved premeditation.

Lastly, defendant contends that the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor, and is excessive or disproportionate to the penalty imposed in similar cases. We do not agree.

As we have said, the jury fixed defendant's sentence at death on the capital murder conviction upon the "vileness" predicate. Defendant points to no meaningful basis for concluding that the determination was made arbitrarily. He merely says the "verdict is irreparably tainted by the error-filled process that produced it" and he is "not a person who deserves to die." On the contrary, the record amply supports the conclusion that

**391 the sentence was appropriate under the circumstances.

[24] On the question of "vileness," the jury found that defendant's conduct in committing the offense involved "depravity of mind and/or aggravated battery." Both of these components of the vileness predicate were established. For example, defendant, in an attempt to avoid arrest, shot the trooper at least six times from close range with a high-powered revolver, two of the shots being independently fatal, under the evidence. The officer posed no threat to defendant in connection with this routine traffic stop; the trooper died with his service revolver still enclosed in its holster. Then, the defendant left and returned to the scene, falsely claiming that he attempted to render assistance to the victim when his real purpose was to retrieve incriminating evidence.

[25] On the question of excessiveness and disproportionality, we determine whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant. Code § 17-110.1(C)(2); Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). To assist in this determination, we consider records of all capital murder cases reviewed by this Court, including cases where life imprisonment has been imposed. Code § 17- 110.1(E).

In Smith v. Commonwealth, 239 Va. 243, 271, 389 S.E.2d 871, 886, cert. denied, 498 U.S. 881, 111 S.Ct. 221, 112 L.Ed.2d 177 (1990), referring to Delong v. Commonwealth, 234 Va. 357, 372, 362 S.E.2d 669, 677 (1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 263 (1988), we compiled capital cases involving murders of police officers. See Eaton, supra. And, today in Cardwell v. Commonwealth, 248 Va. 501, 450 S.E.2d 146 (1994), we referred to those cases where, as here, the death sentences were based upon the vileness factor. From a consideration of all these cases, we conclude that the death sentence in this case is not excessive or disproportionate to the punishment generally imposed by juries in the Commonwealth for similar conduct.

Consequently, we hold the trial court committed no reversible error, and we have independently determined from a review of the entire record that the sentence of death was properly assessed. Thus, the judgment of the trial court will be

Affirmed.

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 4, 1999

No. 98-21
CA-96-829-2

LONNIE WEEKS, JR.

Petitioner - Appellant

v.

RONALD J. ANGELONE, Director of the Virginia Department of Corrections

Respondent - Appellee

On Petition for Rehearing and Rehearing En Banc

Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

denied

JURY INSTRUCTION C1

Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the Defendant to life in prison.

withdrawn

INSTRUCTION NO. 1

You are the judges of the facts, the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

INSTRUCTION NO. 2

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than $100,000.00. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live and a fine of a specific amount, but not more than $100,000.00.

If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live and a fine of a specific amount, but not more than $100,000.00.

INSTRUCTION 3

"Aggravated battery" means a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

JURY INSTRUCTION B1

EVIDENCE IN MITIGATION

Mitigation evidence is not evidence offered as an excuse for the crime of which you have found defendant guilty. Rather, it is any evidence which in fairness may serve as a basis for a sentence less than death. The law requires your consideration of more than the bare facts of the crime.

Mitigating circumstances may include, but not be limited to, any facts relating to defendant's age, character, education, environment, life and background, or any aspect of the crime itself which might be considered extenuating or tend to reduce his moral culpability or make him less deserving of the extreme punishment of death.

You must consider a mitigating circumstance if you find there is evidence to support it. The weight which you accord a particular mitigating circumstance is a matter of your judgment.

① Does the sentence of life imprisonment in the State of Virginia have the possibility of parole and if so under what conditions must be met to receive parole

You shall impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

If we believe that Jonnie Weeks, Jr is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or life sentence. What is the Rule Please clarify.

- See second paragraph of Instruction #2 (Beginning with "If you find from .....

OPPOSITION BRIEF

NO. 99-5746

A. 99A151

**IN THE
SUPREME COURT OF THE
UNITED STATES**

LONNIE WEEKS, JR.,

Petitioner,

v.

**RONALD ANGELONE, Director,
Virginia Department of Corrections,**

Respondent.

**On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The
Fourth Circuit And On Application For Stay Of Execution**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND TO APPLICATION FOR STAY

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QUESTIONS PRESENTED

Where It Is Undisputed That The Petitioner Murdered A Virginia State Trooper By Shooting Him Six Times During A Routine Traffic Stop:

I. **Is there any "compelling" reason to review the Fourth Circuit's application of this Court's recent decision in Buchanan v. Angelone, 118 S.Ct. 757 (1998), to the facts of petitioner's case, which are substantially indistinguishable from those in Buchanan?**

II. **Is petitioner's "experts" claim, for which he clearly has failed to make any plausible showing of "necessity," barred by the "new rule" doctrine?**

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

REASONS FOR DENYING THE WRIT AND A STAY 4

I. Based On This Court's Decision In Buchanan v. Angelone, 118 S.Ct. 757 (1998), The Fourth Circuit Correctly Upheld The Supreme Court Of Virginia's Ruling On Direct Appeal That The Jury Properly Considered The Mitigating Evidence Before Imposing A Death Sentence. 4

II. Weeks' Claim That He Was Constitutionally Entitled To The Services Of Certain Forensic Experts, Which Is Unaccompanied By Any Supporting Factual Argument, Is Barred By The New Rule Doctrine And Does Not Present A Substantial Federal Constitutional Issue. 12

CONCLUSION 17

CERTIFICATE OF COUNSEL 18

TABLE OF AUTHORITIES

Page

Cases

Ake v. Oklahoma, 470 U.S. 68 (1985) 12, 13, 14

Bollenbach v. United States, 302 U.S. 607 (1946) 11

Brecht v. Abrahamson, 507 U.S. 619 (1993) 9

Buchanan v. Angelone, 118 S.Ct. 757 (1998) ..... passim

Caldwell v. Mississippi, 472 U.S. 320 (1985) 12, 13, 14

Graham v. Collins, 506 U.S. 461 (1993) 11

Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157, cert. denied, 484 U.S. 873 (1987) 15

Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920, cert. denied, 117 S.Ct. 1092 (1997) 14

Leonardo v. People, 728 P.2d 1242 (Colo. 1986) 10

Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987) (en banc) 14

McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997) (en banc), cert. denied, 118 S.Ct. 1575 (1998) 10, 11

McKinley v. Smith, 838 F.2d 1524 (11th Cir. 1988) 14

Potter v. United States, 534 A.2d 943 (D.C. 1987) 10

Ross v. Moffitt, 417 U.S. 600 (1974) 15

Sawyer v. Smith, 497 U.S. 227 (1990) 14

Teague v. Lane, 489 U.S. 288 (1989) ..... passim

United States v. Barragan-Devis, 133 F.3d 1287 (9th Cir. 1988) 11

United States v. Zimmerman, 943 F.2d 1204 (10th Cir. 1991) 9

Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999) ..... passim

Weeks v. Angelone, 4 F.Supp.2d 497 (E.D. Va. 1998) 2, 17

Weeks v. Commonwealth, 248 Va. 460, 450 S.E.2d 379 (1994) 1

Weeks v. Virginia, 516 U.S. 829 (1995) 1

Other Authorities

21 U.S.C. § 848(q)(9) 17

28 U.S.C. § 2254(e) 2

Rule 5:7A(a), Rules of the Supreme Court of Virginia 1

Section 8.01-654.1, Code of Virginia 1

U.S.S.Ct. Rule 10 5

STATEMENT OF THE CASE

In a jury trial conducted in the Circuit Court of Prince William County, Virginia on October 18-22, 1993, Lonnie Weeks, Jr. was convicted of the capital murder of Virginia State Trooper Jose Cavazos. In the two-day penalty phase of the trial, after finding that the Commonwealth had proved the statutory "vileness" aggravating factor, see Va. Code § 19.2-264.4, the jury imposed a death sentence on October 22, 1993. On January 14, 1994, the trial court sentenced Weeks to death on the capital murder conviction.[1]

On direct appeal, the Supreme Court of Virginia affirmed Weeks' capital murder conviction and death sentence. Weeks v. Commonwealth, 248 Va. 460, 450 S.E.2d 379 (1994). Then, on January 13, 1995, the state court denied Weeks' petition for rehearing. This Court denied certiorari review on October 2, 1995. Weeks v. Virginia, 516 U.S. 829 (1995).

On December 4, 1995, Weeks filed his state habeas corpus petition in the Supreme Court of Virginia. On January 11, 1996, the Director filed a motion to dismiss the petition as jurisdictionally barred, based upon its untimeliness under Virginia Code § 8.01-654.1 and Rule 5:7A(a) of the Rules of the Supreme Court of Virginia. On March 15, 1996, the Virginia Supreme Court dismissed the petition as jurisdictionally barred. Then, on June 7, 1996, the Supreme Court denied Weeks' petition for rehearing.

Next, Weeks filed a lengthy habeas corpus petition in the United States District Court for the Eastern District of Virginia on February 7, 1997. After extensive briefing and oral argument, the district court dismissed the petition on April 1, 1998. Weeks v. Angelone, 4 F. Supp.2d 497 (E.D. Va. 1998). On June 19, 1998, the district court denied Weeks' motion to alter or amend the judgment.

On appeal, the United States Court of Appeals for the Fourth Circuit unanimously upheld the district court's denial of habeas relief on May 10, 1999. Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999). On June 4, 1999, the Fourth Circuit, without dissent, denied Weeks' petition for a rehearing. On June 14, 1999, the Court of Appeals issued its mandate. The Circuit Court of Prince William County then set Weeks' execution for September 1, 1999. Finally, on August 3, 1999, the Fourth Circuit denied Weeks' motion to recall its mandate and stay his execution.

STATEMENT OF FACTS

Weeks concedes that he shot Virginia State Trooper Jose Cavazos six times during a traffic stop in Prince William County, Virginia, on February 24, 1993. (Pet. at 3). In its opinion the Fourth Circuit reprinted verbatim the facts in this case, as found by the Virginia Supreme Court on direct appeal. Weeks v. Angelone, 176 F.3d at 254-256. These facts are binding on federal habeas corpus pursuant to 28 U.S.C. § 2254(e):

> In early February 1993, defendant, who was age 20, a North Carolina resident, and on probation for a 1992 drug conviction, participated in the burglary of a residence in the Fayetteville, North Carolina area. During the course of that crime, defendant obtained a set of keys to a 1987 Volkswagen Jetta automobile parked at the residence, and stole the vehicle. Later that month, defendant drove the vehicle to Washington, D.C., intending to sell it or trade it for drugs. Defendant carried in the vehicle a Glock Model 17, nine millimeter, semi-automatic pistol loaded with hollow-point bullets. According to the testimony, the bullets were designed for police use, not target practice or hunting; this type of bullet is referred to as a "man-stopper."
>
> During the late evening of February 23, defendant was riding as a passenger in the vehicle being driven by his uncle, 21-year-old Lewis J.

[1] In addition, Weeks pled guilty to use of a firearm in the commission of the capital murder and a related grand larceny charge and was sentenced to respective prison terms of three years and ten years.

Dukes, Jr., a resident of the District of Columbia. The pair was travelling en route from Washington to Richmond southbound on Interstate Route 95.

Around midnight, Trooper Cavazos was operating radar from his marked police vehicle parked in the highway medium monitoring southbound traffic. The Volkswagen driven by Dukes passed the trooper's position at a high rate of speed. The officer activated his vehicle's emergency lights and proceeded to chase the vehicle occupied by defendant. After travelling a brief distance, and passing other vehicles by driving on the right shoulder of the highway, Dukes brought the car to a stop on the Dale City exit ramp, in a dark, remote area.

The trooper pulled his patrol car to a stop behind the Volkswagen, which he approached on foot on the driver's side. Upon the officer's request, Dukes alighted and was standing toward the left rear of the Volkswagen when the trooper asked defendant to step out of the vehicle.

Defendant complied with the officer's request and alighted on the right side of the vehicle as the trooper was near the left side. As defendant left the vehicle he was carrying the fully loaded pistol. He then fired at least six bullets at the officer, two of which entered his body beside the right and left shoulder straps of the protective vest the trooper was wearing. The officer was immediately rendered unconscious and fell to the pavement, dying within minutes at the scene with his police weapon in its "snapped" holster.

Defendant, with Dukes as a passenger, then drove the Volkswagen from the scene and parked it on the lot of a nearby service station. Defendant returned to the scene of the crime on foot and retrieved Dukes' District of Columbia driver's license that had been dropped on the pavement. Defendant rejoined Dukes, and they [walked to] the parking lot of a nearby motel.

* * *

The defendant [subsequently] confessed to the trooper's murder. Defendant stated that when the trooper asked him to get out of the Volkswagen, he picked up the pistol and "thought about throwing it away." Instead, he saw the trooper put his hand down toward his service revolver. Defendant said he then "panicked" and shot the victim "several times rapidly." Defendant stated that he drove, with Dukes as a passenger, to the service station, placing the pistol under the front floor mat of the Volkswagen. This interview lasted about one hour during

which defendant readily answered questions and did not invoke his right to remain silent or any other constitutional right.

REASONS FOR DENYING THE WRIT AND A STAY

I. Based On This Court's Decision In Buchanan v. Angelone, 118 S.Ct. 757 (1998), The Fourth Circuit Correctly Upheld The Supreme Court Of Virginia's Ruling On Direct Appeal That The Jury Properly Considered The Mitigating Evidence Before Imposing A Death Sentence.

Weeks submits that this Court should review his claim challenging the trial court's reply to a question posed by the jury during its penalty phase deliberations because, supposedly, lower courts need guidance concerning how to answer jury questions exhibiting confusion over "technically flawless" instructions. (Pet. at 14). This case, however, is not an appropriate vehicle to address such an issue (assuming, of course, that this Court even would attempt to adopt some standard governing a trial court's response to a jury's question about a facially correct instruction, given the myriad of circumstances actuating such inquiry). Specifically, this Court's recent decision in Buchanan v. Angelone, which expressly confirmed the constitutionality of a jury instruction substantially identical to that in Weeks' case, renders Weeks' claim frivolous.

The Fourth Circuit's rejection of Weeks' fact-specific application of Buchanan plainly was correct and does not warrant this Court's review. 176 F.3d at 260-261.[2] And,

[2] The Court of Appeals rejected Weeks' claim both under § 2254(d) and under a de novo standard of review. See Weeks, 176 F.3d at 259-261 and n.5. The Fourth Circuit did so after rejecting the Director's argument that Weeks had procedurally defaulted this claim. 176 F.3d at 259. The Director continues to assert that the claim is procedurally barred because it was not raised with sufficient specificity in state court. (See Director's CA4 Br. at 8-11).

phase (including the parties' express reference to mitigating evidence in their opening statements and closing arguments, the defendant's presentation of mitigating witnesses over a period of two days, and the statement in the verdict form that the jury had considered the evidence in mitigation) showed that there was no reasonable likelihood that the instructions had precluded the jury's consideration of the defendant's mitigating evidence. Id. at 759-760, 762-763.

In addition, this Court rejected Buchanan's claim that the jury instructions had not made clear that the jury could impose a life sentence even if it found one or both of the statutory aggravating predicates. The Court concluded that any such "interpretation is at odds with the ordinary meaning of the instruction's language and structure." 118 S.Ct. at 762 n.4.

Apart from the identity of the instructions in Buchanan and this case, the additional factors relied upon by the Court in Buchanan exist here as well (with one exception that militates against Weeks' argument). In their opening statements, both the prosecution and the defense alluded to the aggravating and mitigating evidence that the jury would hear during the sentencing phase. (Oct. 21, 1993, Tr. 10-15). Thereafter, the defense presented ten witnesses, including Weeks himself, who testified at length about his background and the circumstances of Trooper Cavazos' death. Much as in Buchanan, the defense did not object to Instruction No. 2. (Oct. 21, 1993, Tr. 178-179). In sharp contrast to Buchanan, though, the trial court did instruct Weeks' jury on the concept of mitigation and specifically said that it "must consider a mitigating circumstance if you find there is evidence to support it." (App. 260, emphasis added). Then, during closing argument counsel for both parties discussed the mitigating evidence in the case and the fact that the

death penalty was not mandatory; defense counsel specifically stated that the jury "could still find that he meets both of these [aggravating predicates], and not sentence him to death." (Oct. 22, 1993, Tr. 18-19, 43-44, 46, 56-57). And, as in Buchanan, the jury's penalty-stage verdict specifically recited that the jury, "having considered the evidence in mitigation of the offense, unanimously fix[ed] his punishment at death." (App. 258). At the conclusion of the penalty phase, each member of the jury was polled and assented to the verdict. (App. 1346).

Thus, the only significant difference between Buchanan and the case at bar is that Weeks' jury was specifically instructed about the meaning of mitigating evidence and its obligation to consider it. Accordingly, Instruction No. 2 must be deemed sufficient to have informed the jury that it had to consider all mitigating evidence and that a death sentence was not automatic once the jury found at least one aggravating factor. It would be nonsensical to conclude that the trial judge's referral of the jury to a specific part of an instruction that this Court found constitutional in Buchanan somehow rendered the instruction unconstitutional.

The cases that Weeks cites as proof of some supposed "split" in the federal and state courts, as to what kind of information a trial court must provide to a jury that has been properly instructed but requests additional guidance, fall woefully short of justifying certiorari review in this case. Leaving aside the overriding fact that none of these cases involved jury instructions that so recently had received this Court's imprimatur (as in Buchanan), without exception the cases that Weeks relies upon are readily distinguishable from his case.

First, Weeks sets up a false distinction between the Fourth Circuit's opinion and caselaw in other circuits by characterizing the Fourth Circuit's ruling as establishing a per se rule. (Pet. at 14-15). This is clearly wrong; the Fourth Circuit merely addressed the propriety of the trial court's response under the record in this case. 176 F.3d at 261-262. The Court of Appeals did not purport to hold that a trial judge always acts properly in referring the jury to the original instructions. Moreover, the Fourth Circuit did not hold that when a jury seeks guidance regarding a facially valid instruction, "the appropriate response is simply to refer the jurors back to that instruction." (Pet. at 14). The Court of Appeals hardly could have done so, considering that the trial court in this case focused the jury's attention upon the specific part of Instruction No. 2 that answered the jury's question.

With one exception, moreover, the cases cited by Weeks are direct appeals. (Pet. at 14-19). Thus, such fundamental principles as finality and comity that inform Teague and, more generally, federal habeas review of state court judgments are simply absent from these cases. See Teague, 489 U.S. at 307-310. The very fact that so many of the cases that Weeks cites considered whether the trial court had "abused its discretion" or had committed "plain error" demonstrates the inapplicability of these decisions to Weeks' federal collateral case. Of course, Weeks is entitled to federal habeas relief only if the trial court committed constitutional error that was not harmless under the test in Brecht v. Abrahamson, 507 U.S. 619 (1993) (federal habeas petitioner must demonstrate that trial court error had substantial or injurious effect on verdict).[3]

The sole habeas case Weeks cites, McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997) (en banc), cert. denied, 118 S.Ct. 1575 (1998), is an exceedingly slender reed upon which to seek certiorari review. In McDowell, during its penalty phase deliberations the jury sent a note to the trial judge, reciting that it had voted for a death sentence by an eleven to one margin and that the eleven jurors favoring the death penalty did not regard the circumstances deemed by the remaining juror to be mitigation "as being either testimony or evidence that should be considered." 130 F.3d at 835 (emphasis added). The Ninth Circuit relied upon this language to conclude that the eleven jurors had "erroneously believed" that they could not consider substantial parts of the defendant's evidence as mitigation. 130 F.3d at 887 (emphasis added). Consequently, the Ninth Circuit held that the trial judge had been required to do something more than merely refer the jury to the general instructions on mitigation.

As the Ninth Circuit later made clear, however, McDowell hinged on the fact that the jury's question reflected, not mere confusion, but an affirmative misunderstanding of

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the trial court's reply to the jury's question was error, the Tenth Circuit emphasized that the government's argument had contributed to the jury's confusion and the original jury instructions had not answered the questions posed or resolved the jury's confusion. 943 F.2d at 1213. Neither of these circumstances was present in the case at bar, where the prosecution's closing argument correctly recited the relationship between the aggravating and mitigating evidence in the case and Instruction No. 2 correctly explicated the jury's sentencing duties. Similarly, in Potter v. United States, 534 A.2d 943 (D.C. 1987), the court acknowledged that a trial judge is not required to respond to every jury inquiry but that, "where a jury shows confusion about a central aspect of applicable law, and the general instruction did not provide the legal information needed, reversible error occurs when the court does not respond to the jury's note." 534 A.2d at 946. Inasmuch as Buchanan demonstrates that the jury charge in Weeks' case did "provide the legal information needed," Potter actually buttresses the trial court's reply to Weeks' jury. See also Leonardo v. People, 728 P.2d 1242, 1255 (Colo. 1986) (trial court may refer jury

the jury charge. United States v. Barragan-Devis, 133 F.3d 1287 (9th Cir. 1988). In similarly sharp contrast to McDowell, Weeks' jury merely inquired about its sentencing options. On its face, the question did not indicate that the jury had found an aggravating circumstance, much less that any member of the jury erroneously believed that such a finding obligated the jury to impose a death sentence. In fact, the jury's question concluded: "What is the rule? Please clarify." (App. 256). Indeed, Weeks admits as much, referring several times to the jury's "clear lack of understanding" or "confusion" about its sentencing options, rather than any affirmative misunderstanding. (Pet. at 6, 7).[4]

Finally, Weeks' own petition makes clear that the present claim is barred under Teague. Accepting as correct Weeks' premise that the circuits are in conflict as to the propriety of the trial court's response in this case, it necessarily follows that a reasonable jurist could have rejected Weeks' claim when this case became final on direct appeal. See Graham v. Collins, 506 U.S. 461, 476 (1993). This conclusion obtains even more strongly with respect to Weeks' reliance on Bollenbach v. United States, 302 U.S. 607 (1946), where this Court held that if a jury instruction is defective the trial court should dispel the jury's professed difficulties "with concrete accuracy." 362 U.S. at 612-613. According to Weeks, there "is no principled reason for applying a different rule when the jury makes explicit its inability to comprehend an instruction...deem[ed] unambiguous." (Pet. at 20). Weeks' attempt to extend the rule of Bollenbach from the realm of defective instructions to the realm of constitutionally valid instructions clearly runs afoul of the new rule doctrine.

[4] At other times in his petition Weeks claims, contradictorily, that the jury's question demonstrated its actual misapprehension of its sentencing duties. (Pet. at 6, 21). In the Fourth Circuit, however, Weeks never claimed, as he does now, that the jury's question

II. Weeks' Claim That He Was Constitutionally Entitled To The Services Of Certain Forensic Experts, Which Is Unaccompanied By Any Supporting Factual Argument, Is Barred By The New Rule Doctrine And Does Not Present A Substantial Federal Constitutional Issue.

Despite Weeks' undisputed confession that he shot Trooper Cavazos six times, petitioner nevertheless claims that he was constitutionally entitled to the services of a ballistic expert and a forensic pathologist to develop a theory that he had not acted with premeditation. (Pet. at 3). Rejecting the Director's default argument, the Fourth Circuit held that Weeks had advanced a constitutional claim on direct appeal that he had been entitled to funding for such expert assistance, but that the Virginia Supreme Court had not addressed this due process claim. 176 F.3d at 262-263. Thus, the Fourth Circuit ruled that § 2254(d) does not apply to Weeks' claim because it was not adjudicated by the state court. The Court of Appeals concluded, however, that Ake v. Oklahoma, 470 U.S. 68 (1985), and Caldwell v. Mississippi, 472 U.S. 320 (1985), demonstrate that Weeks' claim seeks an impermissible "new rule." 176 3d at 263-266.[5]

Weeks asserts that this Court should grant certiorari to resolve a claimed conflict in the circuits over the proper standard of review governing an indigent defendant's motion for state-funded expert assistance. Specifically, Weeks says that federal and state

[5] While holding the Supreme Court of Virginia's failure on direct appeal to address Weeks' constitutional claim meant that the state court ruling was not reviewable under §

courts have reached widely varying conclusions as to the circumstances, if any, under which Ake authorizes funding for non-psychiatric expert assistance.

First, Weeks' own characterization of the circuits' divergent holdings as to the applicability of Ake to funding for non-psychiatric experts, as well as the level of necessity that a defendant must demonstrate to obtain such assistance, is strong evidence that the present claim is not cognizable under Teague. (Pet. at 22, 23, 28, 29). If, as Weeks repeatedly states, courts are divided on these matters, then it cannot possibly be said that the Supreme Court of Virginia's rejection of Weeks' claim was unreasonable or that the Fourth Circuit's rejection of his claim as Teague-barred was erroneous. Assuming that the courts are split in the manner claimed by Weeks, then the proper vehicle for resolving such disagreement would be a direct appeal case, not Weeks' federal collateral case.

A reasonable jurist certainly could have relied upon this Court's holding in Cardwell to find that Weeks had no constitutional entitlement to the assistance of a ballistics expert and a forensic pathologist. In Caldwell, in affirming the trial court's denial of motions for the appointment of an investigator, fingerprint expert, and ballistics expert in a death penalty case, the Court stated: "Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision....We therefore have no need to

habeas case. See Weeks, 176 F.3d at 265-266. Petitioner certainly cites no intervening precedent of this Court expanding upon Caldwell. See also McKinley v. Smith, 838 F.2d 1524 (11th Cir. 1988).[6]

Furthermore, most of the cases cited by Weeks in the present petition either were decided before this Court promulgated its new rule doctrine in Teague and its progeny, see, e.g., Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987) (en banc), or are state court decisions that would have had no occasion to address the Teague bar. (Pet. at 29-30). Weeks has not cited a single case in which a court has held that a reasonable jurist could not have relied upon Ake and Caldwell at the time Weeks' case became final to find that an indigent defendant had no constitutional right to non-psychiatric assistance.[7]

There is, moreover, a glaring omission in Weeks' petition; nowhere does he discuss the specific circumstances surrounding his acknowledged murder of Trooper Cavazos in terms of a supposed need for the requested experts. Yet, Weeks rightly concedes that a State is not constitutionally required to provide for an indigent defendant

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[6] Weeks also contends that his claim is reviewable as an exception to Teague that allows the retroactive application of a "watershed rule of criminal procedure." Teague, 489 U.S. at 311. Inasmuch as "there is no doubt as to the cause of Trooper Cavazos' death," the Fourth Circuit rightly held this exception inapplicable to Weeks' claim. 176 F.3d at 266.

[7] Weeks' reliance upon Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920, cert. denied, 117 S.Ct. 1092 (1997), a case decided by the Virginia Supreme Court one year after Weeks' case became final on October 2, 1995, is wholly misplaced. In Husske, the

all of the services available to a wealthy defendant. See Ross v. Moffitt, 417 U.S. 600 (1974). Further, none of the cases that Weeks cites in his petition holds that an indigent defendant is not required to make **some** showing of necessity to entitle him to funding for expert assistance. Under these circumstances, Weeks' claim exists solely in a vacuum and cannot possibly show that the Fourth Circuit erred in dismissing this claim as Teague-barred or warrant the granting of certiorari.

The record makes clear that Weeks failed to demonstrate that he was entitled to expert assistance. That is, under the specific facts of this case, it simply was not "essential" to Weeks' preparation and presentation of an effective defense that he be provided with state-funded experts in pathology and ballistics.

First, as for the supposed "issue" of Weeks' premeditation in murdering Trooper Cavazos, petitioner suggested in the district court that the requested experts could have helped to determine both the amount of time elapsing between the shots and the "cause of death" of the officer. (App. 1382-1383). Under Virginia law, however, even if Weeks could have proven that he fired the six shots into Cavazos in a rapid-fire manner, this would not have undermined the proof of either the aggravated battery component of the vileness predicate or the premeditated nature of the slaying. The Supreme Court of Virginia has held that an aggravated battery is established by proof that the defendant "fired six pistol shots in rapid succession into [the victim's] head from a distance of three to eighteen inches." Gray v. Commonwealth, 233 Va. 313, 341, 352-354, 356 S.E.2d 157, 173, 180, cert. denied, 484 U.S. 873 (1987).

violation of the terms of his North Carolina probation by traveling to another state and riding in a car that he had stolen and by holding a gun sought in connection with a recent murder in North Carolina. Petitioner's car had stopped in "an extremely dark and isolated area" that drivers on the interstate highway could not see. (App. 855-856). The Supreme Court of Virginia expressly relied upon such evidence on direct appeal. Weeks v. Commonwealth, 248 Va. at 477, 450 S.E.2d at 390. Thus, both as a matter of state law and as a matter of fact, there is no basis for a conclusion that the requested experts somehow were "essential" on the issue of premeditation.

The jury's finding of the "vileness" aggravating factor was based upon both the "depravity of mind" and "aggravated battery" components. (App. 258). On direct appeal, Weeks did not challenge the jury's "depravity of mind" finding. As for the jury's "aggravated battery" finding, petitioner's sole contention was that the Commonwealth could satisfy this standard only by proof that there was some appreciable lapse of time between the first shot and the last. As previously demonstrated, however, the Virginia Supreme Court has held that firing six shots into a victim in rapid succession clearly establishes "aggravated battery." See Gray, 233 Va. at 341, 352-54, 356 S.E.2d at 173, 180.

Weeks testified in the penalty phase of the trial that he had shot the trooper several times with the pistol that Weeks had in his possession. Weeks admitted that Cavazos had been friendly during their encounter and had done nothing to provoke petitioner's lethal actions. The facts thus plainly proved that Weeks, acting in cold blood, killed Cavazos by shooting him repeatedly. No number of experts would have changed this fact. The

Weeks never could demonstrate the required need for experts, even if such a right were assumed to exist:

> [D]efendant, in an attempt to avoid arrest, shot the trooper at least six times from close range with a high-powered revolver, two of the shots being independently fatal, under the evidence. The officer posed no threat to defendant in connection with this routine traffic stop; the trooper died with his service revolver still enclosed in its holster. Then, the defendant left and returned to the scene, falsely claiming that he attempted to render assistance to the victim when his real purpose was to retrieve incriminating evidence.

Weeks v. Commonwealth, 248 Va. at 478, 450 S.E.2d at 391.[8]

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari and the application for a stay should be denied.

Respectfully submitted,

RONALD ANGELONE, Director,
Virginia Department of Corrections,

By: Robert H. Anderson III
Counsel

[8] It is noteworthy that neither in the Fourth Circuit nor in the present petition has Weeks challenged the district court's upholding the Magistrate Judge's denial of his motion for ballistics and forensic experts pursuant to 21 U.S.C. § 848(q)(9). (App. 1439-1455). See Weeks v. Angelone, 4 F.Supp.2d at 518-522. The district court concluded that the requested experts were not "reasonably necessary" within the meaning of § 848(q)(9). 4 F.Supp.2d at 520-522. Because the district court's denial of Weeks' motion for funding

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On August 24, 1999, a copy of this brief was mailed to Timothy M. Richardson, Esquire and Glen A. Huff, Esquire, Huff, Poole & Mahoney, P.C., 4705 Columbus Street, Virginia Beach VA 23462 and Sterling H. Weaver, Sr., Esquire, P.O. Box 543, Portsmouth VA 23705, counsel for petitioner.

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Assistant Attorney General

death had on not only his family but on his co-workers. You will hear that Mrs. Cavazos will never be the same. You will hear that Jose had two children; these children, one of which is in college at this time, that they will never be the same.

You will hear that his fellow troopers will never the same. You will hear that, on at least one occasion -- you will hear from everybody -- but you will hear, for example, at least one trooper could not get out of his car after this happened, his patrol car, for some time.

You will hear that he did and still harbors thoughts of leaving the profession of law enforcement. This is the impact that the law is designed to, hopefully, protect against.

In addition to that, you will hear that the Defendant was on probation in the State of North Carolina at the time this happened. You will hear that the Defendant had been convicted of conspiracy to possess drugs with intent to distribute.

I would ask you, after you've heard all of the evidence, to weigh it carefully, using your common sense and your good judgment, knowing how awesome your

responsibility is, I would ask you to sentence him to death in accordance with law and in accordance with the evidence.

Thank you.

THE COURT: Thank you, Mr. Ebert. Mr. Baker, sir?

MR. BAKER: Thank you.

Ladies and gentlemen of the jury, like Mr. Ebert, I'd also like to thank you for your attention. It is obvious to us, both, to be sure, the Commonwealth and the defense, that you have paid very close attention to this case, and you have taken it very seriously, as such a case rates seriousness.

As Mr. Ebert states, the evidence will be presented here that the killing of Trooper Cavazos had a terrible impact, and the defense will not dispute it did not have a terrible impact on his wife and on his fellow troopers.

We could not dispute that that death did not have an impact and we could not say in any way that it was justified. We in opening statement never suggested that this individual had any right whatsoever to do this, because murder can never be justified under any

conditions.

However, what the jury must now do is decide the two alternatives that are open to them. That is, one, death; and the other, life in prison.

We will introduce evidence to show that this Defendant basically lead a good life for approximately eighteen years. He lived in a terrible neighborhood infested by drugs. Violence was rampant and yet he stayed out of trouble.

We'll show also that this individual was a regular churchgoer for eighteen years. I guess if there's anything to be learned outside this case, would be that going to church is good for one because, as Lonnie Weeks went to church, he never got in trouble. He never got in trouble.

As Mr. Ebert alluded to, this was an individual with some promise. This was an individual who was a star basketball player, an individual that probably could have been scholarship material to an ACC team and maybe have played in the NBA. Coach House will testify that he probably -- his coach at Fayetteville 71st High School -- will testify he was one of the finest basketball players he ever had, and he tried.

We'll also introduce evidence from his friends that Lonnie never, with the one exception, was a violent person. He didn't get in fights.

I believe Coach House will testify he never got ejected from a game. He never can remember him even getting a technical foul. For those of you who know something about basketball, a fierce competitor can get a technical foul rather easily because tempers do rise. But, that's not Lonnie Weeks' background.

So, you as the jury will have to consider this. Now, we won't submit to you that Lonnie Weeks did not go bad after he finished high school and after he quit going to church, because he certainly did things.

Mr. Ebert alluded to you he has a conviction for selling drugs. Yes, he does. He has one conviction on his record involving sale of marijuana, which he was sentenced to, I believe, three years in prison, suspended. That is the only conviction he has.

He has no juvenile record, and I'll submit to you, ladies and gentlemen of the jury, when you hear evidence of the neighborhood he came from and the type of -- shall we say -- community it was, he was the exception. That's what makes this all the more remarkable.

Now, the problem -- Lonnie did not get to go to college because of his grades. Even though he became academic ineligible his senior year, he still was recruited by a junior college, Mount Olive, and he was preparing to go there.

You'll also hear evidence that Lonnie has two children by two different women, but also that he cares about these children and he tried to support them. He wasn't able to get good jobs, so he sort of took the easy path.

Now, this is an individual that you will see the human side of him. What he did, obviously, cannot be forgiven. However, the question will be, should he pay the ultimate price for this, or is there enough goodness in this individual that this jury could find mercy in its heart to spare his life.

Ladies and gentlemen of the jury, that is the part of the trial that we now proceed with.

Thank you.

THE COURT: Mr. Ebert?

EVIDENCE ON BEHALF OF THE COMMONWEALTH

MR. EBERT: Sergeant Casey.

THE COURT: Sergeant Casey?

law, Mr. Willett.

MR. WILLETT: Sir, I do have that aggravated battery.

(Pause in proceedings.)

THE COURT: Counsel, have you had the opportunity to look at the instructions?

MR. BAKER: Yes, sir.

MR. WILLETT: Yes, sir.

THE COURT: Is there any objections to Commonwealth's Number One?

MR. MORISSETTE: No, Your Honor.

THE COURT: Is there any objection to Commonwealth's Number Two, I believe as agreed to?

MR. MORISSETTE: That's with the fine deleted, Your Honor?

THE COURT: That's my understanding.

MR. WILLETT: Yes, that's correct.

THE COURT: Mr. Willett, you're going to provide a clean copy?

MR. WILLETT: Yes, sir.

THE COURT: I see in the first part of the instruction you're going to have to delete some, as well as where you made some delineations later in the

instruction, line four, five.

MR. WILLETT: Yes, sir.

THE COURT: All right, sir. Then, that will be given by agreement?

MR. MORISSETTE: Well, I believe so, at this point, Your Honor, yes.

MR. BAKER: Yes, sir. We have no objection to it.

THE COURT: All right, then, it will given by agreement. Number three, Commonwealth's Number Three?

MR. BAKER: I don't have it.

MR. WILLETT: I just gave it to you a few seconds ago.

MR. EBERT: That's the one he just handed to you.

MR. BAKER: Okay, thank you. (Counsel examines document.)

I have no objection to it.

THE COURT: All right, sir, then as to the three that have been proffered by the Defendant, Al?

MR. EBERT: Objection to that, Your Honor.

THE COURT: All right, sir.

MR. EBERT: Your Honor, that's not a correct

Most poor people, almost all poor people, believe in the law and support it, and they don't break it.

If his poverty is an excuse for his crime, then our system of justice needs to be changed.

Judge Whisenant has told you something about the law which we will get to very briefly, but I want to touch on all the mitigation evidence that you've heard about what he was like as a young man; a basketball star, there were pictures -- they even introduced pictures of his children. We could have introduced pictures of Jose's children, too, but that's not what this case is about.

All of these people told you what he was like when he was young. None of them could tell you what he was like now, and I was struck by the similarity of the statements which the different witnesses made.

Ms. Vivien said, when she learned about the offense which Mr. Weeks had executed, "This couldn't be the Lonnie I used to know."

Donnie Reece, from his church, said, "I couldn't believe it was the Lonnie I once taught in Sunday school." Perhaps, most tragically, Mrs. Leach said, "I couldn't believe this was Lonnie, the boy I knew, that I

raised."

The boy that she knew and she raised is no longer among us. He disappeared many years ago, and he has been replaced by a man who would commit a crime such as this.

The law Judge Whisenant has told you about. The Commonwealth has to establish to your satisfaction either one of two things.

First, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

His testimony yesterday, his deviousness, and his purpose, which was to mislead you, is the most compelling evidence of his continued threat to society.

Forget all the crimes he's committed in the last -- well, he's only been out of High School for a couple of years, a year and a half, but look what he's done.

He's been busy. He's done just about every crime you can think of, with the exception of rape. Is there anything that is beyond him? Can you think of a crime that this man would not commit, given the year and a

Lonnie Weeks is not such a person. He had a religious background, and he was deeply moved. He has sinned. He has sinned. He does not deny that he has sinned, grievously, he has sinned.

He believes that if his soul is right he might go to heaven, and that's what he wants. Now, ladies and gentlemen, I submit to you that is really what the Christian religion is about.

The Commonwealth had alluded to you, in order to sentence this -- fix this defendant's sentence of death, you must find two things, and that is that --

MR. WILLETT: Excuse me, Judge. I hate to interrupt, but it would be either one of the things, not two things.

MR. BAKER: You're correct, Mr. Willett.

MR. WILLETT: Thank you.

MR. BAKER: I made a mistake. There are two factors you can consider, either one of which would justify a death sentence, and that is after considering his criminal history and background, there is a probability that he would constitute a continuing serious threat to society.

Or, that his conduct in committing the offense

was outrageously wanton and vile, or inhumane, it involved depravity of mind, or aggravated battery to the victim, beyond the minimum necessary to accomplish the act of murder.

Prior to this offense, the defendant had one conviction. Now, he committed a bunch of other offenses, and you can consider that. Now, you could still find that he meets both of these criterias, and not sentence him to death.

I believe you will read that in the instructions. Now, ladies and gentlemen, I stand before you, humbly. This defendant admits that he has committed a terrible crime. He has admitted that he has killed an innocent man. He has tried to tell you, although the Commonwealth will say it's a bunch of self-serving lies, what happened.

Now, ladies and gentlemen, he never said, an evil spirit. He tried to explain, but that was the Commonwealth's words. That was not his.

When he was being asked he tried to explain something that he has great difficulty in his own mind explaining, and I hope you understand that when you decide.

evidence. You've heard the evidence and you folks are going to have to determine what the appropriate punishment is in this case.

I take no pleasure in asking you to impose the death penalty. We have the death penalty and you don't have to impose it, but all of you have taken an oath that you can consider both options.

I would say to you folks that if you're going to have the death penalty, this case is the type of case that it's designed for. Now, why do I say that? Because we have to look at the defendant as you saw him today, and as he was on the day that this crime was committed.

There is no question about the fact, back when he was in High School, there is no evidence before you, that he was dangerous, that he had turned to a life of crime. That's not what we're dealing with here, folks. You're dealing with what we've got here today.

It's been pointed out earlier; he had every advantage -- I won't say, every advantage, but many advantages that other people don't have. Sure, his parents -- one died and the other one left him. One was a drug user, couldn't stand it, according to his grandmother, but this man didn't use drugs. This man sold

drugs for profit. That is the testimony and it's uncontradicted testimony before you. This man is greedy. This man is selfish.

That's what you have before you. He told you; he wanted money, and that's why he did what he did. That's why he sold drugs, that's why he broke in Mr. Farmer's house, that's why he stole his car.

Everything that he has done throughout this trial, I would submit to you, is an attempt to mitigate what might happen to him. He lied from the onset, throughout, to the Officer. And why? Because he was selfish and he didn't want to get caught and he didn't want to admit it.

Once he got -- he felt that the evidence was overwhelming, he changed his story a little bit. Then, he got on the stand yesterday, folks, and he told you certain things for one reason and one reason alone, and that was to mitigate the punishment that you're entitled to impose on him, that you've sworn to consider. under the law.

I say to you if you believe what he said on the stand yesterday, sentence him to life. If you don't, and you believe that the type of person that he is, that he was trying to serve himself, I say sentence him to

It dwelt within him when he sold drugs. It dwelt within him when he broke in a helpless man's home and took his belongings. It dwelt within him with he took his car.

Luther Washington (sic) told you why he was going to Washington, to sell it; and I say that's credible.

Now, what's incredible, to me, and you be the judge of it; he tells you, I'm going to bring the car back and park it. The man stole everything he had inside and ransacked the house, he's going to sell the television, stereo, get the money that he wanted so badly, and he says, oh, I'm going to take it back. I was just taking it for a little joyride, up to visit my relatives.

Folks, I say that's baloney. That's the person you're dealing with.

Everything he does is calculated for his self-interest. What so tragic about it, and God knows nobody likes to come out of poverty. He didn't have to be that way. He had jobs. The system, the judicial system such as we've had, gave him an opportunity; putting him on probation.

And the Judge, no doubt, heard every word you heard yesterday in mitigation, what a nice fellow he was,